APPELLATE MALPRACTICE*

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I. INTRODUCTION

Legal malpractice is defined in terms of negligence, although a suit for breach of contract is recognized as an alternative action in some states.[1] Lawsuits against trial attorneys for negligence are "governed by the same principles" that apply in other actions for negligence.[2] Similarly, appellate malpractice is also based on negligence. It arises when a lawyer fails to exercise a reasonable degree of skill and care in the appeal of a client's case, causing injury to the client. Because the prospects for success on appeal may be damaged by both trial and appellate lawyers, both may be subject to malpractice claims pertaining to issues of appellate review.

For the trial lawyer, an appellate-related malpractice claim may arise from such errors or omissions as failure to preserve the record for appeal; advising a client against taking an appeal when it is warranted; or failing to timely file or perfect an appeal when an appeal was the agreed upon course of action. For the appellate lawyer, a claim may arise from mistakes made in handling any aspect of the appeal itself.

In considering an action against a trial attorney or appellate counsel, malpractice is not limited to litigation issues. Attorney malpractice can and often does arise in transactional work as

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1. *See infra* pt. VII.

2. *Maryland Cas. Co. v. Price*, 231 F. 397, 402 (4th Cir. 1916).

well. "[R]edressable harm ... need not depend upon the outcome of any litigation because the negligent preparation of [a written instrument] could potentially be the cause of the financial loss that the [clients] incurred in reforming the [instrument]."[3] Malpractice may also arise from negligent acts or omissions in negotiations surrounding litigation.[4]

II. STANDARD OF CARE

Legal malpractice claims may arise from a lawyer's failure to exercise a reasonable standard of care in representing a client. The standard of care that applies to appellate malpractice is the degree of care and skill that a reasonable appellate lawyer from the same community would exercise in handling the same type of appeal, under the same rules, laws, and set of facts.[5] Reasonableness should be measured at the time representation was rendered, especially with regard to liability for decisions of then novel or untested legal theories.[6] "The general rule is that an attorney may be held liable for ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action."[7]

"An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession."[8] But as specialization increases in the legal field, an attorney who holds him or herself out to be a specialist must "exercise the

3. *Porter v. Ogden, Newell & Welch*, 241 F.3d 1334, 1340 (11th Cir. 2001).

4. *See Smiley v. Manchester Ins. & Indemn. Co.*, 375 N.E.2d 118, 123 (Ill. 1978) (holding liable a lawyer sued for failure to make a settlement offer that his client authorized). The failure resulted in a liability judgment in excess of the policy limit. The plaintiff's expert witness, a local lawyer, testified that it was unreasonable for a lawyer not to have made such an offer, and that the lawyer failed to exercise the degree of reasonable care usually exercised by other lawyers in the area. The court held that in view of the authority of the lawyer to settle, and because he never made the offer, his inaction was the proximate cause of the client's excessive liability. *Id.*

5. *Simko v. Blake*, 532 N.W.2d 842, 846 (Mich. 1995).

6. *Darby & Darby, P.C. v. VSI Intl., Inc.*, 739 N.E.2d 744, 747-48 (N.Y. 2000); *see also* Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 17.7, 509 (4th ed., West Publg. Co. 1996).

7. *Bernstein v. Oppenheim & Co., P.C.*, 554 N.Y.S.2d 487, 489–90 (App. Div. 1990).

8. *Simko*, 532 N.W.2d at 846.

degree of skill and knowledge possessed by those attorneys who practice in that specialty."[9]

III. ELEMENTS OF APPELLATE MALPRACTICE

The elements of legal malpractice pertaining to appellate review are the same as for other claims of attorney negligence. To prevail in an appellate malpractice action, a plaintiff must show 1) that the lawyer had a duty to the client based on the existence of the attorney-client relationship; 2) that the lawyer breached the duty by negligent act or omission; 3) that the lawyer's breach of duty was the proximate cause of the plaintiff's injury; and 4) that the plaintiff suffered a legally cognizable injury.[10]

A. Proof of Duty

The existence of a bona fide lawyer-client relationship is generally accepted as confirmation that the lawyer has a duty to the client.[11] As a result, the first element of an appellate malpractice case is often the easiest one for a plaintiff to prove. Occasionally, courts have been willing to find a duty owed to a non-client when that party is an intended third party beneficiary of an attorney-client relationship.[12] However, the courts that have recognized such limited liability to a non-client have consistently held that legal malpractice claims are not assignable

9. *Duffey Law Office, S.C. v. Tank Trans., Inc.*, 535 N.W.2d 91, 95 (Wis. App. 1995).

10. David J. Meiselman, *Attorney Malpractice: Law and Procedure* § 3.1, 39-40 (Law. Co-op. Publg. Co. 1980).

11. *Simko*, 532 N.W.2d at 846 ("In legal malpractice actions, a duty exists as a matter of law if there is an attorney client relationship.").

12. *Natl. Union Fire Ins. Co. v. Salter*, 717 S.2d 141, 142 (Fla. Dist. Ct. App. 1998) ("To bring a legal malpractice action, the plaintiff must either be in privity with the attorney . . . or the plaintiff must be an intended (not incidental) third-party beneficiary."); *see also McLane v. Russell*, 546 N.E.2d 499, 502 (Ill. 1989) (same); *Cal. Pub. Employees' Retirement Sys. v. Sherman & Sterling*, 741 N.E.2d 101, 104 (N.Y. 2000) (same). *Cf. Moransais v. Heathman*, 744 S.2d 973, 977 (Fla. 1999) ("Florida recognizes a cause of action based on professional negligence against an individual professional who did not personally contract with the aggrieved party, but who is an employee of the professional services corporation that did contract with the aggrieved party.").

because of the personal and confidential nature of the attorney-client relationship.[13]

B. Proof of Negligence

Proving breach of duty, however, is often more difficult. The courts generally require the plaintiff to present expert testimony to prove breach of duty unless the reason for the breach is so obvious that it is within the average juror's competence to decide if the conduct was unreasonable.[14] For example, obvious errors, such as failing to file a suit within the time allowed by the statute of limitations, may not require an expert's evidence.[15]

On the other hand, malpractice claims based on the lawyer's strategic decisions about a case will generally require another attorney with knowledge of that area of the law to opine that a particular act or omission fell below the standard of care to be expected of practitioners in that field. Thus, where a client brought an appellate malpractice claim against a lawyer who failed to raise certain requested federal constitutional issues in the appellate brief, the state appellate court ruled that the plaintiff failed to prove malpractice because no expert testimony was presented to show that the lawyer failed to use a reasonable degree of skill and care in the representation. On the contrary, a constitutional law expert testified on behalf of the lawyer, stating that the issues raised and argued on appeal by the lawyer were far more likely to succeed than the ones suggested by the client.[16]

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13. *See Natl. Union*, 717 S.2d at 142.

14. *RTC Mortg. Trust v. Fidelity Natl. Title Ins. Co.*, 58 F. Supp. 2d 503, 524 (D.N.J. 1999) (quoting with approval *Sommers v. McKinney*, 670 A.2d 99, 104 (N.J. Super., App. Div. 1996), where the court held that "the facts of a given case may be such that a layperson's common knowledge is sufficient to permit a finding that the duty of care has been breached").

15. *Little v. Matthewson*, 442 S.E.2d 567, 571 (N.C. App. 1994) ("Where no issue is raised as to defendant's responsibility for allowing the statute of limitations to run, where the negligence of defendant is apparent and undisputed, and where the record discloses obvious and explicit carelessness in defendant's failure to meet the duty of care owed by him to plaintiff, the court will not require expert testimony to define further that which is already abundantly clear.") (quoting *House v. Maddox*, 360 N.E.2d 580, 584 (Ill. 1977)).

16. *Randall v. Bantz, Gosch, Cremer, Peterson & Sommers*, 883 F. Supp. 449, 450 (D.S.D. 1995). The client had specifically requested that the issues be raised to preserve the

C. Proximate Cause and Injury: Loss of a Winning Cause or Loss of Access?

Proving that the appellate lawyer's breach of duty was the proximate cause of the plaintiff's injury can also be difficult. Most courts require the plaintiff to prove that "but for" the lawyer's negligence, the case would have succeeded on appeal.[17] The degree of proof that courts require to prove "but for" causation varies from jurisdiction to jurisdiction.[18] A small minority of courts require a plaintiff to establish with "certainty" that but for the attorney's negligence a more favorable result would have been achieved.[19] Others demand a lesser showing of "probability" and apply a "substantial factor" standard to establish causation.[20] Regardless of the degree of proof required, the rule in these jurisdictions requires some showing that the malpractice plaintiff would have succeeded in the underlying appeal.

Other courts, however, hold that merely defaulting on a plaintiff's appellate claim is itself actionable. A prime example is *Cincinnati Insurance Company v. Byers.*[21] A lawyer was sued in state court for appellate malpractice after an appeal was dismissed for failure to file the trial transcript and record on appeal within the time frame permitted by the court. After removal to federal court, the trial judge granted the lawyer's motion for summary judgment because the former client failed to establish that the appeal would have been successful on the merits. The Sixth Circuit reversed, noting that the state supreme

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right to file for a writ of certiorari to the United States Supreme Court in the event of an unsuccessful appeal. After the appeal was denied in the state court, the client was unable to petition for certiorari because the constitutional issues had not been raised.

17. *See e.g. Patterson v. Swarr, May, Smith & Anderson*, 473 N.W.2d 94, 101 (Neb. 1991); *Carmel v. Clapp & Eisenberg*, 960 F.2d 698, 703 (7th Cir. 1992); *Pickard v. Turner*, 592 S.2d 1016, 1019 (Ala. 1992); *St. Pierre v. Washofsky*, 391 S.2d 78, 79 (La. Ct. App. 1980).

18. Meiselman, *supra* n. 10, § 3.3, 42-43.

19. *Id. See e.g. Coon v. Ginsberg*, 509 P.2d 1293, 1295 (Colo. App. 1973).

20. Meiselman, *supra* n. 10, § 3.3, 43 (stating that the majority view is represented by *Maryland Cas. Co.*, 231 F. at 401 (holding, to recover in a suit against an attorney, "the plaintiff must prove . . . such negligence resulted in and was the proximate cause of" loss)). *See also RTC Mortg. Trust*, 58 F. Supp. 2d at 526 (explaining that the New Jersey Supreme Court has held that the substantial factor test should be applied).

21. 151 F.3d 574, 579 (6th Cir. 1998).

court "explicitly rejected the notion that a plaintiff asserting a claim for legal malpractice is required in all instances to prove that the plaintiff would have prevailed in the underlying proceeding giving rise to the action."[22] The court of appeals remanded in order to allow appellant to pursue a claim based on the "lost settlement opportunity" resulting from dismissal of the appeal in the state action.[23]

Another plaintiff-friendly approach is to put the burden of proving whether or not the appeal would have prevailed on the appellate lawyer who defaulted. For example, an appellate malpractice claim was filed for a lawyer's failure to timely file an appellate brief, which resulted in dismissal of the appeal.[24] While the malpractice case was pending in federal district court, the state supreme court ruled that the "but for" requirement of a legal malpractice claim is too harsh on plaintiffs, and that it was more logical to "impose on the negligent attorney . . . the burden of going forward with evidence . . . proving that the client could not have succeeded on the original claim."[25]

D. Accrual of a Cause of Action

The jurisdictions are in conflict regarding when the legal injury to the plaintiff occurs and the cause of action arises. Generally, to sustain an action in negligence, the plaintiff is required to prove actual and redressable harm or injury.[26] This means that the injury cannot be merely speculative or

22. *Id.*

23. *Cf.* Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 San Diego L. Rev. 401 (2000) (presenting a detailed argument for malpractice recovery against a litigation attorney who acts unreasonably, regardless of whether plaintiff can prove that he would have won at trial). His article argues that the causation defense, "the greatest barrier for those who have received inadequate professional services," should be replaced or supplemented with alternative doctrines of (1) the substantial factor test, (2) the burden-switching technique and (3) the loss of chance valuation of damages. *Id.* at 406-407. In principle, the same arguments should apply on appeal.

24. *Cabot, Cabot & Forbes Co. v. Brian, Simon, Peragine, Smith & Redfearn*, 568 F. Supp. 371, 372 (E.D. La. 1983).

25. *Id.* at 373 (quoting *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 422 S.2d 1109, 1110 (La. 1982)).

26. *Porter v. Ogden, Newell & Welch*, 241 F.3d 1334, 1339 (11th Cir. 2001) (Florida law "draw[s] a distinction between knowledge of actual harm from legal malpractice and knowledge of potential harm").

conjectural.[27] The practical effect of the actual injury requirement is that the cause of action does not accrue for limitations purposes until the injured party knows or should know of it.[28] Thus, under Florida Statutes § 95.11, the cause of action accrues for statute of limitation purposes from the "time the cause of action is discovered or should have been discovered" with the exercise of due diligence.

In the context of litigation based malpractice, the cause of action does not accrue until the final judgment is rendered because prior to final judgment, injury is merely speculative.[29] In cases that proceed to a final judgment, "[t]he . . . statute of limitations for litigation-related malpractice . . . begins to run when final judgment becomes final," not when the verdict was rendered or the negligent acts or omissions occurred.[30] Thus, where counsel was negligent in rejecting settlement offers without consulting the client, the statute of limitations did not run until conclusion of the underlying litigation.[31] Finality also requires conclusion of appellate review if the adverse judgment is appealed.[32]

However, in a malpractice action based on transactional representation, "redressable harm is not established until the documents or legal items fail to achieve their designated

27. *Giambrone v. Bank of N.Y.*, 677 N.Y.S.2d 608, 609 (App. Div., 2d Dept. 1998) ("Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a *prima facie* case of legal malpractice.").

28. *See Porter*, 241 F.3d at 1339 ("Florida courts hold that a malpractice action accrues when it is reasonably clear that the client has actually suffered some damage from legal advice or services.") (quoting *Throneburg v. Boose, Casey, Ciklin, Lubitz, Martens, McBride & O'Connell, P.A.*, 659 S.2d 1134, 1136 (Fla. App. 1995)).

29. *Porter*, at 1338 ("When a plaintiff bases a malpractice action on errors committed in the course of litigation, and the litigation proceeds to judgment, the redressable harm is not established until final judgment.").

30. *Silverstone v. Edell*, 721 S.2d 1173, 1175 (Fla. 1998).

31. *See Fremont Indem. Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A.*, 796 S.2d 504 (Fla. 2001).

32. *Peat, Marwick, Mitchell & Co. v. Lane*, 565 S.2d 1323, 1325 (Fla. 1990) ("A clear majority of the [Florida] district courts [of appeals] have expressly held that a cause of action for legal malpractice does not accrue until the underlying legal proceeding has been completed on appellate review because, until that time, one cannot determine if there was any actionable error by the attorney.") *See also Watkins v. Gilbride Heller & Brown, P.A.*, 783 S.2d 224, 225 (Fla. 2001) (statute of limitations did not begin to run until after the supreme court's resolution of client's petition for writ of certiorari in the underlying case).

purpose."[33] In transactional representation, it is possible for the client to suffer a concrete injury prior to a court holding that written instruments created during representation "fail to achieve their designated purpose."[34] The actual injury can be shown by a client suffering additional expenses to remedy the deficiencies in the instruments that give rise to the malpractice claim.

An exception to the accrual of a cause of action is the continuous representation doctrine.[35] The continuous representation rule "tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed."[36] The continuous representation doctrine is applicable in both litigation and transactional contexts. In litigation-based malpractice, the continuous representation rule tolls the statute of limitations until all trial and appellate litigation in the underlying case is complete,[37] or until the attorney is replaced in the litigation of the underlying case.[38] In a transactional setting, under the continuous representation doctrine the statute of limitations would be tolled until representation in the transaction which gave rise to the cause of action is completed.[39]

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33. *Porter*, 241 F.3d at 1339.

34. *Id.*

35. *Shumsky v. Eisenstein*, 750 N.E.2d 67, 69 (N.Y. 2001) (noting that an "action to recover damages for legal malpractice accrues when the malpractice is committed" unless continuous representation doctrine applies).

36. *Glamm v. Allen*, 439 N.E.2d 390, 393 (N.Y. 1982).

37. *Jacobsen v. Haugen*, 529 N.W.2d 882, 885 (N.D. 1995) (continuous representation doctrine "tolls the statute of limitations or defers accrual of the cause of action while the attorney continues to represent the client" in the underlying litigation).

38. *Hampton v. Payne*, 600 S.2d 1144, 1146 (Fla. App., 3d Dist. 1992) (holding that statute of limitations began to run when client replaced her attorney in the underlying litigation; client could no longer avail herself of the continuous representation rule once she replaced her attorney).

39. *Zaref v. Berk & Michaels, P.C.*, 595 N.Y.S.2d 772, 774 (App. Div., 1st Dept. 1993) (continuous representation applies only in connection with continuation of the particular transaction that is the subject of the allegation); *Boorman v. Bleakley, Platt, Schmidt, Hart & Fritz*, 451 N.Y.S.2d 179, 180 (App. Div., 2d Dept. 1982) ("[C]ause of action under th[e] doctrine of continuous representation does not accrue until the attorney's representation concerning a particular transaction is terminated.").

E. Abandonment

Under the theory of abandonment, before bringing a malpractice action, "a party may be required to pursue an appeal rather than accept a settlement" on the underlying case that gives rise to the malpractice action.[40] Appellate review of the underlying case is a safeguard that gives an attorney the opportunity to cure a nonprejudicial defect that could have been "judicial error rather than legal malpractice."[41] If a favorable outcome on appeal could eliminate the injury complained of by the plaintiff in the malpractice action, the plaintiff will not be able to establish a redressable injury until the appeal in the underlying action is terminated.[42]

However, when it is not possible for the alleged malpractice to be corrected on appeal, the client need not suffer the additional cost of an adverse judgment on appeal in the underlying action as a condition precedent to bringing the malpractice cause of action.[43] This is because the redressable harm is not dependent on the outcome of the litigation, and the absence of an appeal does not impede review that could compensate for the injury caused by the malpractice. In such a case, settlement of the underlying action does not automatically constitute abandonment of a malpractice claim; there is no rule that compels the filing of a futile appeal for the client to show actual redressable injury for a malpractice claim.[44]

The theory of abandonment of a legal malpractice claim has been traditionally narrow, allowed only when an adverse judgment in the underlying action would likely have been corrected on appeal.[45] If such is the case, then the malpractice

40. *Parker v. Graham & James*, 715 S.2d 1047, 1048 (Fla. App., 3d Dist. 1998).

41. *Id.*

42. *Coble v. Aronson*, 647 S.2d 968, 970 (Fla. App., 4th Dist. 1994).

43. *Id.* at 971; *see also Parker*, 715 S.2d at 1048 (holding that when settlement does not thwart any review process that would cure malpractice, settlement of appeal does not constitute abandonment of malpractice claim); *Segall v. Segall*, 632 S.2d 76, 78 (Fla. App., 3d Dist. 1994) ("We are unable to establish a bright line rule that complete appellate review of the underlying litigation is a condition precedent to every legal malpractice action.").

44. *Hunzinger Constr. Corp. v. Quarles & Bradley*, 735 S.2d 589, 594-95 (Fla. App., 4th Dist. 1999).

45. *Eastman v. Flor-Ohio, Ltd.*, 744 S.2d 499, 503 (Fla. 1999) (quoting with approval *Lenahan v. Russell L. Forkey, P.A.*, 702 S.2d 610, 611 (Fla. App., 4th Dist. 1993): "[T]he

action is considered "abandoned if a final appellate decision is not obtained."[46]

F. Criminal Cases

In the criminal context, a defendant's usual recourse for deficient representation will be habeas corpus or other collateral attack based on ineffective assistance of counsel.[47] However, in some limited circumstances, even a criminal defendant might have a civil cause of action for damages against a defense attorney for legal malpractice. The burden of establishing the lawyer's negligence as the proximate cause of the underlying conviction requires the defendant to win appellate or post-conviction relief.[48] In other words, the conviction must be overturned or the defendant must be exonerated in order for him to prove that "but for" the attorney's negligence, there would not have been an underlying conviction to begin with.

IV. MISTAKES THAT LEAD TO APPELLATE MALPRACTICE CLAIMS

As the preceding cases illustrate, the grounds for appellate malpractice claims vary, and are generally tied to the failure of counsel to perfect or present certain aspects of a client's appeal. Defaults include failing to file a timely appeal, failing to raise an issue on appeal, and failure to transmit the record on appeal.

A. Failure to Raise an Issue on Appeal

One of the most common potentially actionable errors

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dismissal or settlement of a related case, or the failure to take an appeal of the underlying lawsuit, will [not] automatically translate into an inability to establish redressable harm.").

46. *Segall*, 632 S.2d at 78.

47. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that the Sixth Amendment imposes a standard of reasonable competence in determining ineffective assistance of counsel in the trial or sentencing of a criminal case). The same standard applies to the first appeal as of right in a criminal case. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

48. *Steele v. Kehoe*, 747 S.2d 931, 933 (Fla. 1999) ("A majority of jurisdictions have held that appellate or postconviction relief is a prerequisite to maintaining [an] action [for legal malpractice]."); *Britt v. Legal Aid Socy., Inc.*, 741 N.E.2d 109, 112 (N.Y. 2000) (same).

made is the failure of counsel to raise an issue on appeal. A lawyer is expected to use his professional judgment in assessing the merits of a case. In deciding which issues to appeal, the lawyer should be selective and not appeal every conceivable issue.[49] Even if a lawyer is negligent in failing to raise an issue on appeal, however, such an omission will not be actionable unless the client can prove that injury resulted from it.

Thus, where a client who was sued for fees by his former attorney counterclaimed for malpractice based on failure to raise an issue on appeal, the appellate court affirmed the grant of the defense motion for summary judgment. The court held that the issue that the client sought to raise was not a valid one, and its omission therefore could not support an action for malpractice based on the lawyer's failure to follow the instructions of the client.[50] Similarly, failing to raise an issue on appeal is not malpractice if the issue was correctly decided in the lower court.[51] In a case where the client claimed that the lawyer failed to raise and argue the propriety of a trial court restitution order, the court ruled that the client failed to show any connection between the lawyer's negligence and actual damage, i.e., that "but for" the alleged omissions and negligence of the lawyer, the client would not have been ordered to pay restitution.[52]

B. Failure to Timely File an Appeal

Appellate malpractice based on the failure to timely file an appeal is another common ground of malpractice suits. Thus, the plaintiff prevailed in his malpractice action based on a failure to file an appeal because he showed that had appeal been timely filed it would have been successful.[53]

Conversely, failure to file a timely appeal of a dismissal is not grounds for action if the underlying case would not have

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49. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

50. *Trustees of Schools v. Schroeder*, 278 N.E.2d 431, 435 (Ill. App., 1st Dist. 1971).

51. *Senise v. Mackasek*, 642 N.Y.S.2d 241, 242 (App. Div., 1st Dept. 1996).

52. *Id.*

53. *Cree Oil Co. v. Home Ins. Co.*, 653 S.2d 620, 629 (La. App., 3d Cir. 1995). The court found that the trial court erred in holding the oil company liable, and ruled that had the appeal been taken, the oil company would have been relieved of its liability. Because the oil company showed that it could have prevailed on appeal, the appellate lawyer was found to be negligent.

succeeded.[54] Thus, the grant of a defense motion for summary judgment was affirmed where the plaintiff client did not show that the lawyer's untimely filing of the appeal was the proximate cause of any injury because the underlying claim was not cognizable under federal or state law and was therefore doomed to fail.[55] Similarly, another court held that a lawyer was not liable for appellate malpractice, even if he was negligent in failing to file timely the notice of appeal, because the client could not have recovered on the underlying action for intentional infliction of emotional distress and a variety of other torts.[56]

C. Other Failures to Perfect an Appeal

Many blunders that lead to appellate malpractice claims are easily avoidable mistakes that arise when lawyers ignore or overlook the rules that must be followed on appeal.[57] Although in many of the cases cited, the errors or omissions were not enough to overcome the plaintiff's burden of proving his or her claim,[58] it is important to note that the mishandling of these issues resulted in the costs and inconvenience of defending a claim. This generally means notifying the malpractice liability carrier and suffering increases in future premiums.

1. Failure to File Record on Appeal or Brief

A lawyer filed the client's notice of appeal on time, but failed to timely file the brief and record on appeal. Two years

54. *Natl. Wrecking Co. v. Spangler, Jennings, Spangler & Dougherty*, 782 F.2d 101, 102 (7th Cir. 1985).

55. *Id.* at 106.

56. *Kunau v. Pillers, Pillers & Pillers, P.C.*, 404 N.W.2d 573, 576-577 (Iowa App. 1987).

57. In *McAlister v. Slosberg*, 658 A.2d 658, 659–60 (Me. 1995), the client hired the attorney to represent him on appeal in reliance on the attorney's representation that "he had a thirty percent chance of prevailing." Two years later, the client learned that the appeal had been dismissed because the attorney failed to file an appellate brief.

58. *Id.* at 660. The complaint contained "no allegation nor did he offer any evidence that, absent the misconduct by Slosberg, he would have been successful on the appeal . . . [the client] merely alleged in his complaint that he suffered 'the lost opportunity which may have resulted in prevailing on the appeal' . . . . [T]he trial court properly granted a judgment as a matter of law in favor of [the lawyer] on this claim."

later, the attorney sought permission to file them, but the court found no valid reason to excuse the delay. Although the court found that the lawyer was guilty of negligence as a matter of law, it held that he was not liable because the appeal would not have been successful even if it had been brought.[59]

2. Failure to File Required Documents

An appellate lawyer filed a timely notice of appeal, but then failed to file certain required documents. As a result, the client's appeal was dismissed. The court recognized that the client had lost the opportunity to appeal because of the lawyer's negligence, but it determined that an appellate court would not have reversed or reached a more favorable judgment on the underlying claim.[60]

3. Certification of Incomplete Transcript as Correct

An appellate attorney certified a transcript on appeal as correct and later realized that it did not contain testimony from the suppression hearing in the underlying criminal case. The appellate attorney filed a motion seeking a writ from the court directing the court reporter to file a transcript of her notes with the court, but the motion was denied. The client's conviction was subsequently upheld by a per curiam affirmance. He then filed an appellate malpractice suit alleging that his appeal on the merits was rejected because of the missing suppression hearing testimony. The court held that the per curiam affirmance indicated the appeal had no merit, and that the client was not prejudiced by the missing testimony.[61]

4. Failure to Print Record on Appeal

A plaintiff alleged that her appellate lawyers failed to

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59. *Katsaris v. Scelsi*, 453 N.Y.S.2d 994, 996-998 (Sup. Ct. 1982). *See also McAlister*, 658 A.2d at 660 (failure to file brief and lying about appeal pending); *Bryant v. Seagraves*, 526 P.2d 1027, 1028 (Or. 1974) (failure to file abstract of record or brief); *Kilmer v. Carter*, 78 Cal. Rptr. 800, 805 (2d App. Dist., Div. 5 1969) (failure to file brief).

60. *Jones v. Psimos*, 882 F.2d 1277, 1284 (7th Cir. 1989).

61. *Stewart v. Walls*, 534 S.2d 1033, 1035 (Miss. 1988). *See also Welder v. Mercer*, 448 S.W.2d 952, 954 (Ark. 1970) (failure to obtain and file transcript).

perfect an appeal of a divorce order because the time for appeal expired without the required printing of the record. The court found no merit in the plaintiff's claim because the client failed to advance the funds required to cover the costs of printing the record after she was contacted repeatedly. As a result of the client's inaction, the time for perfecting the appeal expired.[62]

D. Failure to Notify Client

Failing to perfect the appeal or raise a meritorious issue on appeal is not the only way in which appellate counsel can commit malpractice. In one case, appellate counsel was paid $15,000 to undertake an appeal and did so successfully. However, after winning reversal and remand on the issue of damages, he failed to notify his client of the victory. No proceedings on remand were pursued, and five years later judgment was entered against the client. The client sued appellate counsel. The trial court dismissed but the appellate court reversed, holding that the complaint was sufficient to state causes of action in negligence and breach of contract.[63]

V. DEFENSE: THE HONEST EXERCISE OF PROFESSIONAL JUDGMENT

Not every mistake made by an appellate lawyer constitutes actionable malpractice. An appellate lawyer must exercise professional judgment on a wide range of issues in the course of appellate representation. The lawyer must decide whether to file an appeal, which issues to raise on appeal, and how to structure and argue the case. Courts have consistently held that a lawyer's honest, professional judgments made to advance the client's case are protected from malpractice claims.[64] Such professional

62. *Frist v. Leatherwood, Walker, Todd & Mann*, 433 F.2d 11, 12 (4th Cir. 1970) (per curiam).

63. *See Perkovic v. Barrett*, 671 A.2d 740, 744 (Pa. Super. 1996). While upholding a cause of action for failure to notify, the court rejected plaintiffs' claim that appellate counsel had a duty of continued representation after remand under the fee agreement for the appeal.

64. *Simko*, 532 N.W.2d at 847 ("Where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment.").

judgments include choice of trial tactics and decisions made about how to conduct a case.[65]

This rule is offset by the fact that the lawyer must always be sure to exercise a reasonable degree of skill and care in all dealings on behalf of the client.[66] In sum, an appellate malpractice claim is not likely to be actionable if it is based on an unfavorable outcome resulting from an appellate lawyer's honest exercise of professional judgment. Second-guessing the appellate attorney's judgment, or surmising what another attorney might have done under similar circumstances, is insufficient to prove an appellate malpractice claim.

The following examples demonstrate that a lawyer's honest exercise of professional judgment succeeded as a defense to a claim for appellate malpractice.

A. Failure to File Cross-Appeal

In *Burk v. Burzynski*,[67] the plaintiff claimed that the lawyer's failure to file a cross-appeal constituted appellate malpractice. The lawyer testified that he exercised his best professional judgment in deciding not to cross-appeal, because he believed it would be too costly for the client and would damage the arguments made on behalf of the client at trial and on appeal. The plaintiff provided no expert testimony that filing a cross-appeal in such a case was the standard of due care. The court held that no cause of action existed against the lawyer because, although he may have made errors in judgment in litigating the case, the errors arose from his professional judgment as to how to best handle the case.[68]

B. Failure to Raise Issue on Appeal

In *Holmberg, Galbraith, Holmberg, Orkin & Bennett v. Koury*,[69] the court held that an appellate lawyer's strategic decisions or mistakes of judgment during the handling of a

65. *Id.*

66. *Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980).

67. 672 P.2d 419 (Wyo. 1983).

68. *Id.* at 427.

69. 575 N.Y.S.2d 192, 194 (App. Div., 3d Dept. 1991).

client's appeal did not constitute appellate malpractice. In *Koury,* a plaintiff attorney brought an action to recover legal fees, and the defendant client counterclaimed, seeking damages for appellate malpractice. The client argued that the attorney failed to raise certain issues on appeal, and that the attorney "failed to give an aggressive, interesting, creative, and convincing oral argument."[70] The court held that the brief filed was "prepared after an adequate investigation of the facts and research of the law, and the relevant issues were raised in the brief."[71] The court found that the lawyer's conduct was "a strategic decision, or at most, a mistake of judgment."[72]

C. Failure to Understand Unsettled Law

It is generally recognized that mistakes in judgment that arise from a misunderstanding of an unsettled area of law are not actionable as legal malpractice.[73] In *Buchanan v. Young,*[74] the court considered whether the dismissal of an appeal constituted malpractice in a case where an appellate lawyer miscalculated the tolling effect of motions for JNOV or for new trial on the time for filing the notice of appeal. The court found that the lawyer's miscalculation was reasonable because the law on the issue was not settled at the time that the appeal was filed. The court held that a lawyer cannot be held liable for malpractice based on an error in judgment arising from unsettled law.

To the contrary, in *DeBiasi v. Snaith,*[75] the court found malpractice despite the ambiguity in the rules of procedure. The lawyer mistakenly believed that the appellate rules allowed motions for rehearing, clarification, or certification to be filed serially, and that the fifteen-day time limit would not be tolled until each successive motion was ruled upon. The lawyer filed timely motions for clarification, rehearing, and rehearing en banc, which were denied. The lawyer then filed a subsequent motion for certification within fifteen days of that denial. That

70. *Id.*
71. *Id.*
72. *Id.*
73. Mallen & Smith, *supra* n. 6, § 17.1, 497-99.
74. 534 S.2d 263, 264-65 (Ala. 1988).
75. 732 S.2d 14, 16 (Fla. App., 4th Dist. 1999).

motion was denied as untimely. The client then brought the malpractice action against the lawyer. The court held that a "mere 'ambiguity of a rule' of procedure, without more, does not equate to the somewhat more amorphous realm of 'fairly debatable' or 'unsettled area of the law' to which the doctrine of judgmental immunity is applied."[76]

VI. APPELLATE COUNSEL'S DUTY TO INFORM A CLIENT OF A POTENTIAL MALPRACTICE CLAIM AGAINST THE TRIAL LAWYER

In a 1981 Informal Opinion, the American Bar Association responded to an inquiry concerning the duty of an appellate counsel to advise a client that a civil cause of action for malpractice against trial counsel was appropriate.[77] In the ABA's view, the rules neither prohibited nor required the advice. The opinion stated, however, that it would be appropriate for appellate counsel to advise the client of the potential claim against trial counsel, because Ethical Consideration 2-2 urged lawyers to assist lay persons in recognizing legal problems which may not be self-revealing or timely noticed.[78]

In 1989, the Illinois State Bar Association took a stronger position on the issue.[79] A hypothetical question involved an appellate lawyer who was retained to represent an appellant who was appealing an adverse judgment in a civil action for the death of a minor struck by a drunken driver. The inquiry was whether the appellate lawyer had a duty to disclose to the client the potential malpractice claim against the trial lawyer based on a discovery that the trial lawyer failed to name a potential defendant in the lawsuit within the statute of limitations.

In the State Bar's view, the appellate counsel had a duty to disclose the trial lawyer's potential malpractice, because failure

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76. *Id.*

77. ABA Comm. on Ethics and Prof. Responsibility, Informal Op. 1465 (1981).

78. *See* Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 Temple L. Rev. 1171, 1203 (1988). The article, citing ABA Informal Opinion 1465, asserted that an appellate lawyer representing a criminal defendant on appeal may have an ethical obligation to inform the defendant of the right to file a malpractice action against the trial lawyer. *But see Steele*, 747 S.2d at 933 (noting that "appellate, postconviction, and habeas corpus remedies are available to address ineffective assistance of counsel"); *see also* n. 48, *supra*, and accompanying text.

79. *See* Ill. St. Bar Assn. Advisory Op. 88-11 (1989).

to do so could clearly damage the client. The Bar based its opinion on Illinois Rule 7-101(a)(3). The rule stated in part that "a lawyer shall not prejudice or damage a client during the course of a professional relationship." The State Bar also determined that the duty continued even after the representation ended. In affirming the opinion, the Board of Governors relied on Illinois Rules of Professional Conduct 1.4(b) and 2.1. Rule 1.4(b) stated that "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 2.1 stated that "a lawyer shall exercise independent professional judgement and render candid advice."

Another writer has addressed the issue of a lawyer's ethical obligation to disclose the malpractice of prior counsel, within a broader discussion of the entire controversy doctrine.[80] The article concluded that if the new lawyer finds that the client has a malpractice action against prior counsel, the new lawyer is obligated to inform the client. The author found this duty in several Rules of Professional Conduct:[81] the duty of loyalty and competence to the client; the duty to keep the client reasonably informed about the status of the matter; and the duty to explain matters to the extent reasonably necessary to permit the client to make informed decisions.[82]

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80. *See* Nancy J. Moore, *Implications of Circle Chevrolet for Attorney Malpractice and Attorney Ethics*, 28 Rutgers L.J. 57 (1996) (appearing in *Symposium: Entire Controversy Doctrine*).

81. *Id.* at 64. The author cited New Jersey Rules of Professional Conduct 1.7 (conflict of interests), 1.1 (competence), and 1.4(a) and (b) (communication). To support her conclusion, she also cited Ill. Advisory Op. 88-11, *supra* n. 79, ABA Informal Opinion 1465, *supra* n. 77, and Pa. St. Bar Op. 88-225, which concluded that an appellate lawyer who discovers malpractice by the trial lawyer must inform the client (1) that the case was dismissed as a result of the trial lawyer's lateness under the statute of limitations and (2) that the client may have a legal malpractice claim against the trial lawyer.

82. Moore, *supra* n. 80. The author also considered whether the new lawyer had an affirmative duty to search for possible malpractice of the trial lawyer when it was not apparent and whether the new lawyer could limit the scope of representation to avoid investigation and disclosure of the original lawyer's malpractice. She answered both questions in the affirmative. *Id.* at 70-71.

VII. BREACH OF CONTRACT AS AN ALTERNATIVE CAUSE OF ACTION

Breach of contract is widely recognized as an alternative or supplement to the typical negligence claim for attorney default or misfeasance.[83] Indeed, the contract claim developed first:

> Professional malpractice has its origins in contract law. Initially, the professional was viewed as breaching his or her professional duties under a contractual relationship of privity with the client. When contract theories failed to provide a good justification to permit an award for bodily injury damages, particularly in medical malpractice, the cause of action evolved into a negligence theory.[84]

As medical malpractice jurisprudence evolved from its contractual basis into the tort theory of negligence, so did other types of professional malpractice, including attorney malpractice. Still, a cause of action for breach of contract is viable for some attorney malpractice claims,[85] even though "[t]ort law has traditionally provided the primary means for resolving claims of attorney malpractice."[86]

Part of the reason negligence has become the favored cause of action for attorney malpractice is because of the common difficulty in establishing the express terms of the contract necessary to define the duty breached. For an express contract to come into existence, the attorney must agree "to perform a specific service or act in a particular manner."[87] If appellate counsel simply fails to perform at all, a clear-cut case of breach of contract can be shown. This may arise where the attorney defaulted on the agreement to take a timely appeal, or to perfect

83. *E.g. Gunn v. Mahoney*, 408 N.Y.S.2d 896, 900 (Sup. Ct., Erie County 1978) ("inartfully drawn" complaint framed separate claims on two causes of action: breach of contract and negligence which is tortious in nature).

84. *Monroe v. Sarasota County Sch. Bd.*, 746 S.2d 530, 535 (Fla. App., 2d Dist. 1999).

85. *Collins v. Reynard*, 607 N.E.2d 1185, 1186 (Ill. 1992) ("Today we rule that a complaint against a lawyer for professional malpractice may be couched in either contract or tort and that recovery may be sought in the alternative.").

86. *Id.* at 1188 (Miller, C.J., concurring).

87. Mallen & Smith, *supra* n. 6, § 769, 555.

an appeal which was dismissed as a result.[88] But if the claimed error or omission is of a more subtle nature involving the quality of the representation, there will often be no specific term of the contract that was breached. This will present an obstacle to bringing an action for breach of contract for the defective appellate representation.[89]

If it is necessary for the plaintiff to argue that the contract for appellate representation implies terms of ordinary skill and knowledge, it is the functional equivalent of arguing negligence. In such cases, the two theories of recovery converge.

> No matter how the undertaking to exercise ordinary skill and knowledge is characterized, the essential claim is for legal malpractice. The theories share the same facts and, except for the effect of certain defenses, such as the statute of limitations, usually reach the same result.[90]

For example, in a case where appellate counsel failed to raise a potential claim on appeal, there would ordinarily be no specific contractual clause or term breached to allege as a basis for a suit in contract.[91] A suit for breach of contract would have to allege that the lawyer's undertaking on appeal implied the use of ordinary skill, and that such implied promise was breached. In such a case, the essence of the claim has reverted to the

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88. *Pelton v. Andrews*, 74 P.2d 528, 530 (Cal. App., 2d Dist., Div. 2 1937) (an allegation that an attorney "failed to perform" may be deemed to sound in contract and not negligence).

89. *See Busk v. Flanders*, 468 P.2d 695, 697 (Wash. App., Div. 1 1970) (indicating that in an alleged contract breach, the court will look to see if the written document relied upon contains some guaranteed or promised result); *Corceller v. Brooks*, 347 S.2d 274, 277–78 (La. App., 4th Cir. 1977) (warning that the plaintiff in a legal malpractice action will have a difficult time establishing a breach of promise in the absence of an explicit promise in an express contract that has been breached); *Pacesetter Commun. Corp. v. Solin & Breindel, P.C.*, 541 N.Y.S.2d 404, 406 (App. Div., 1st Dept. 1989) (stating that a "breach of contract claim against an attorney based on a retainer agreement may be sustained only where the attorney makes an express promise in the agreement to obtain a specific result and fails to do so").

90. Mallen & Smith, *supra* n. 6, § 8.1, 556-57. Considerations that may affect the choice between suing in negligence or contract include differing statute of limitations periods, *see Linder v. Eichel*, 232 N.Y.S.2d 240, 245 (Sup. Ct., N.Y. County 1962), whether a chose in action may be assigned, *see Goodman & Mitchell v. Walker*, 30 Ala. 482, 497 (1857), and the measure of damages sought, *see Farah v. Mafride & Kormanik, P.C.*, 927 S.W.2d 663, 674 (Tex. App., 1st Dist. 1996).

91. *But cf. Randall v. Bantz, Gosch, Cremer, Peterson & Sommers*, 883 F. Supp. 449, 450 (D.S.D. 1995) (client specifically requested issues to be raised on appeal).

functional equivalent of a negligence action because the requisite proof is a breach of a duty of due care.

Some jurisdictions have created hybrid causes of action by statute, independent of and encompassing common law contract and tort liability.[92]

> The once important subject of which theory of liability a plaintiff in a legal malpractice case should rely upon has lost much of its impact. Today, the same essential standard applies regardless of theory and regardless of how the cause of action is phrased.[93]

Some scholars further discount the differences between the alternative theories of liability and even refer to attorney malpractice as neither contract nor tort, rather "lying in a 'borderland' between the two."[94]

Where there is a choice of tort or contract theory, appellate malpractice resulting from an attorney's failure to file or to perfect an appeal may be easier to prove based on breach of promise instead of negligence. Expert witnesses to testify to the standard of professional care would not be necessary. The duty of the attorney to the client is breached in such an obvious way that the contract claim may well justify a grant of summary judgment against the defaulting attorney.

The measure of damages recoverable in contract is different than in tort, but in practice the two theories often yield similar results. Typical contract damages, or expectation damages, seek to put the plaintiff in the same position he would have been in

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92. *E.g.* Ala. Code § 6-5-573 (1975):

> One form of action.
>
> There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action and shall have the meaning as defined herein.

See also Ala. Code § 6-5-572 (1975):

> Definitions.
>
> (1) Legal Services Liability Action. A legal services liability action embraces any form of action in which a litigant may seek legal redress for a wrong or an injury and every legal theory of recovery, whether common law or statutory, available to a litigant in a court in the State of Alabama now or in the future.

93. Meiselman, *supra* n. 10, § 2.3, 17-18.

94. *Busk v. Flanders*, 468 P.2d 695, 698 (Wash. App. 1970) (citing William L. Prosser, *The Borderland of Tort and Contract*, in *Selected Topics on the Law of Torts* 380 (West 1954)). *See also* Peter W. Thornton, *The Elastic Concept of Tort and Contract as Applied by the Courts of New York*, 14 Brook. L. Rev. 196 (1948).

had the contract not been breached.[95] "The expectation interest is based not on the injured party's hopes at the time he made the contract, but on the actual value that the contract would have had to him had it been performed."[96] Damages must be established with a reasonable degree of certainty.[97] This raises the question whether the measure of damages should be based on the value of the appeal if it had succeeded, or merely the out-of-pocket damages represented by the payment of fees and costs. Recovery of the latter would make the plaintiff ex ante whole[98] but would not confer upon plaintiff the expected value of the case; the plaintiff would merely be restored to the position he was in before the breach of contract occurred.

Additional damages based on the value of the underlying appeal if it had succeeded must be pled and argued as expectation damages.[99] In order to be recoverable, consequential damages must be a foreseeable result of the breach that created the cause of action.[100] It is axiomatic that a breaching party

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95. E. Allen Farnsworth, *Contracts* § 12.1, 812-13 (Little, Brown & Co. 1982).

96. *Id.*

97. *Restatement (Second) of Contracts* § 352 (Am. L. Inst. 1979) (stating the rule: "Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.").

98. Brian A. Blum, *Contracts: Examples & Explanations* § 18.7, 613 (2d ed., Aspen L. & Bus. 1998) ("[R]estitution is premised on the theory of *disaffirmance*—it treats the breach as having caused the contract to fall away . . . [and] seeks to return to the plaintiff the *value* of any *benefit conferred* on the defendant under the breached contract.") (emphasis in original). *See also Restatement (Second) of Contracts* § 344 ("Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee. . . . (c) his 'restitution interest,' which is his interest in having restored to him any benefit that he has conferred on the other party.").

99. Blum, *supra* n. 98, at 612 ("Although expectation damages are the primary remedy for breach of contract, they can only be recovered to the extent that the plaintiff can prove that the breach [resulted in the loss] . . . .").

100. *See Restatement, supra* n. 97, § 351:

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
>
> (a) in the ordinary course of events, or
>
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
>
> (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

cannot be held liable for an injury that was not caused by the breach.[101] The plaintiff's burden in pleading and proving consequential damages parallels the burden faced by plaintiff in a negligence action in establishing that the attorney was the proximate cause of the damages.[102]

VIII. SUMMARY

It appears that there is a growing tendency for dissatisfied clients to sue their former attorneys for alleged legal malpractice at trial or on appeal. While the reported cases often show a favorable outcome for the attorney, it is reasonable to assume that many cases of clearer liability were settled without litigation all the way through a reported appellate opinion. There is no way to track the number of settlements that have been paid by counsel or their liability carriers to avoid exposure to valid claims or simply to avoid the costs of defending weak ones.

Even where counsel may defeat a malpractice claim on the basis of favorable doctrines of no causation or no injury, the damage to professional reputation and increase in liability insurance premiums are things that every practitioner will wish to avoid to the maximum extent possible. Careful attention to the fundamentals of appellate practice and the particular requirements of court rules of appellate procedure is the solution.

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101. *See* Blum, *supra* n. 98, at § 18.6.4, 607 ("There must be a *link between the breach and the loss*. Causation is not usually an issue when direct damages are concerned . . . [h]owever, consequential damages are by definition more remotely connected to the breach, and when they are claimed, it must be established that they were indeed a consequence of the breach.") (emphasis in original).

102. *See supra* pt. III(C). Most courts require a plaintiff to prove that "but for" the attorney's negligence, the case would have succeeded on appeal; a minority hold that merely defaulting on a plaintiff's claim is itself actionable. *See also* Mallen & Smith, *supra* n. 6, at §8.4, 581 ("The prevailing rule is that an attorney's negligence need not be the sole cause of the client's loss. If the wrongful conduct was a substantial factor, it need not be the sole proximate cause.").