Damages resulting from the negligence of an attorney are not presumed. Siddiqui, supra, 243 Va. at 497, 416 S.E.2d at 450. An attorney is liable only for actual injury to the client and damages are calculated on the basis of the value of what is lost by the client. Thus, while the client is not required to prove the exact amount of incurred damages, the client is required to present facts and circumstances from which the trier of fact can make a reasonably certain estimate of those damages. Goldstein, supra, 243 Va. at 173, 413 S.E.2d at 349-50.

Furthermore, the damages in a legal malpractice action must be foreseeable. Stone v. Chicago Title, 330 Md. 329 (1993); Campbell v. Bettius, 244 Va. 347, 352, 421 S.E.2d 433, 436 (1992) (holding all requirements of proximate cause applicable to attorney malpractice); Stewart v. Delaney, 5 Va. Cir. 105; 1983 WL 210357 (Va. Cir. Ct. 1983). In Stone, the client originally hired the attorney to handle a settlement of a home purchase at which time the attorney failed to release all liens encumbering the property. A year later, the client attempted to secure a home equity loan on the aforementioned home in order to meet his stockbroker's margin call for stocks that he had purchased on credit. The home equity loan was not processed before the margin call's due date because of an existing lien on the property, which the attorney had originally failed to release. Without the home equity loan funds, the client was forced to sell stock at a substantial loss in order to meet his broker's demand. The client then sued the attorney to recover his stock market losses. The Court found that the client's "stock market damages were a highly extraordinary result of [the attorney's] failure to timely record the release." Stone, 330 Md. at 341. The Court held that there "was no acceptable nexus between [the attorney's] negligent conduct and the stock market losses suffered by [the client]." Id.

Similarly, in Stewart, a Virginia Circuit Court held that damages in a case where an attorney failed to record a deed were unforeseeable because the client lost the deed and the grantor denied its execution. The Court reasoned, "To warrant a finding that negligence . . . is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligent or wrongful act and that it ought to have been foreseen in the light of the attending circumstances." Stewart at 7, *quoting*, Cornell v. C & O Ry. Co., 93 Va. 44 (1896). Instead, the Court found that the client's loss of the deed was unforeseeable and intervening.

As stated in Thomas, the "case within a case" approach has drawn criticism on many different grounds. Thomas, 351 Md. at 534. Opponents of the approach argue that it does not represent an accurate or complete reconstruction of the original lawsuit. Furthermore, the evidence introduced in the malpractice suit may be inferior to the evidence that would have been offered at the underlying trial of the case. Finally, commentators have declared that it is simply unfair to require the client to litigate a case against his lawyer, who has superior knowledge about the strengths and weaknesses of the case. Yet the courts have been hesitant to accept any alternative suggested by the opponents of the "case within a case" approach and therefore the approach continues to be used inasmuch as no better alternative exists.

Conclusion

While the number of legal malpractice actions filed mounted in the 1980s and then increased beyond anything that could have been anticipated by older practitioners in the 1990s, the basic outlines of the cause of action remained fairly stable. While some States rashly developed special tests, the Courts of Maryland, Virginia, and Washington, D.C. have been careful to work within the traditional concepts of a legal malpractice action, preserving the special relationship between attorneys and their clients.

Legal Mutual
Liability Insurance Society of Maryland

333 South Seventh Street,
Suite 2200
Minneapolis, MN 55402

PRE-SORTED
FIRST-CLASS MAIL
U.S. POSTAGE
PAID
PERMIT NO 23
PRIOR LAKE MN

THE SOLICITOR

Legal Mutual
Liability Insurance Society of Maryland

MARCH 2008

Legal Malpractice in Maryland, Virginia, and Washington D.C.

Part II: Breach and Proximate Cause

The second element of the cause of action, "neglect of a reasonable duty," typically requires the presentation of expert testimony. Expert testimony is required to establish the standard of care when the breach of the standard of care owed by an attorney is beyond the knowledge of an average person. Fishow v. Simpson, 55 Md. App. 312 (1983); Ripper v. Bain, 253 Va. 197, 482 S.E.2d 832 (1997); Mills, 647 A.2d at 1123. In Fishow, the Maryland Court of Special Appeals found that an attorney's alleged failure to elicit testimony and failure to produce sufficient evidence to establish malpractice required an expert witness to determine if the standard of care had been breached. On the other hand, the court stated that an attorney's failure to notify a client of the termination of his services was an example where the average person could declare that the standard of care had been breached. In Ripper, the Virginia Supreme Court reaffirmed the general stance that "the questions whether an attorney has exercised the required degree of care and, if not, whether the failure was a proximate cause of the client's loss are to be decided by a fact finder, after considering expert testimony." Ripper at 203, 836.

The approach in the District of Columbia, as illustrated in Mills applies the same reasoning as the aforementioned cases. In Mills, plaintiffs sued their former attorneys for failure to file suit against real estate brokers implicit in the perpetration of a fraud, despite maintaining an action against the settlement attorneys. The D.C. Court of Appeals determined, "Unless the attorney's lack of care is so obvious that the jury can find negligence as a matter of common knowledge, the standard and its violation must be proved by expert testimony." Mills, 647 A.2d at 1123.

Even in a non-jury case, an expert is required in most situations. "A determination of the standard of reasonable care by the trial judge based upon his own private investigation, or upon his own intuitive knowledge of the court, untested by cross examination, or any of the rules of evidence, constitutes a denial of due process in a criminal or civil matter." Fishow, 55 Md. App. at 319 (quoting Bonhiver v. Rotenberg, Shwartzman Richards, 461 F. 2d 925 (7th Cir. 1972)). "Generally, the questions, whether an attorney has exercised that degree of care and, if not, whether the failure was the proximate cause of the client's loss, are to be decided by a fact finder, after considering testimony of expert witnesses." Heyward & Lee Const. Co., Inc. v. Sands, Anderson, Marks & Miller, 249 Va. 54, 57, 453 S.E.2d 270, 272 (1995). In a recent D.C. Court of Appeals case, the appellate court found the testimony of an expert necessary when the trial judge concluded he could not determine the appropriate standard of care in a complex business case. Television Capital Corp. of Mobile v. Paxson Communications Corp., et. al., 894 A.2d 461 (D.C. 2006).

Many of the disputes arising in connection with the issue of whether the attorney has breached a duty owed to the client concern the scope of the representation. Attorneys should be extraordinarily careful in defining the scope of their employment in Retainer Agreements and correspondence with their clients, where appropriate. See, Home Fed. Sav. & Loan v. Spence, 259 Md. 575 (1970). In Spence, the Maryland Court of Appeals stated "that before an attorney can be held liable, it must appear that the loss for which he is sought to be held *arose* from his failure to discharge some duty which was fairly within the purview of his employment." Id. at 585. Virginia shares Maryland's approach to the creation of a duty. The Supreme Court of Appeals of Virginia, in Glenn v. Haynes, 192 Va. 574, 580, 66 S.E.2d 509, 512 (Va. 1951), held, "An attorney is not bound to undertake to render services for another without compensation and if he voluntarily engages to do so he is liable for the consequences of his improper management, and cannot allege as a defense lack of consideration for his services." Certainly, this law warrants the use of a retainer agreement that clearly indicates the services the attorney intends to provide, as well as strict adherence to that agreement. In Egan v. McNamara, 467 A.2d 733, (D.C. 1983), the D.C. Court of Appeals addressed a similar issue as it pertains to doing personal work for shareholders of a corporation. In this case, the court determined that "the corporation in this case was McNamara's client. Moreover, McNamara . . . did not receive separate compensation for the personal legal services rendered to Rohrich. Most significantly, however, these miscellaneous services had no bearing upon the Agreement (which was the subject of the malpractice suit)." Egan, 467 A.2d at 739. While the D.C. court acknowledged the possibility of extended duties, the court held that there is necessarily a distinction between work done for a corporation, and work done for

Continued on page 2

an individual member of that corporation. The scope of the duty owed to the individual will not include obligations to the corporation.

Another area involving the second element, which is frequently in dispute, concerns attorneys making tactical decisions or exercising their judgment where the reasonable attorney might pursue different tactics or strategies. The courts have generally found that where reasonable attorneys might disagree as to the best course of action, the attorney's decision should not be the subject of a legal malpractice action. See, e.g. Fishow; Mills. This rule has often been applied in cases where clients sue their attorneys for negligently recommending a settlement. See, Prande v. Bell, 105 Md. App. 636 (1995); Thomas v. Bethea, 351 Md. 513 (1998); Macktal v. Garde, 111 F. Supp.2d 18, 22 (D.D.C. 2000). In order to avoid "chilling settlements, prolonging litigation, and encouraging frivolous malpractice suits by former clients who settle their dispute and later decide that the settlement was, in some way, unfair," the Maryland Court of Special Appeals in Prande ruled that a plaintiff can not prevail unless the lawyer recommended a settlement which no reasonable lawyer with knowledge of the case would have made. Prande, 105 Md. App. at 656. This heightened standard was not adopted by the Maryland Court of Appeals in the later Thomas case, where the Court followed a more traditional approach thereby abandoning the special standard created by Prande. Likewise, the United States District Court for the District of Columbia, in Macktal, pointed out, "Settlements necessarily involve compromise, as well as considerations evaluated in the thick of litigation, and so hindsight challenges to recommended settlements as being inadequate must fail if they are based only on speculation about what alternative results could have been achieved." Macktal, 111 F. Supp.2d at 22.

Furthermore, attorneys must be extremely conscious of the Rules of Professional Conduct to ensure that they will be able to collect their fees and avoid malpractice suits. Prior to Post v. Bregman, 349 Md. 142 (1998), the Maryland courts had ruled that a violation of the Maryland Lawyers' Rules of Professional Conduct (MLRPC) did not provide a basis for a client to void his contract with an attorney or to establish a breach of the attorney's duty of care. In Post, the Court of Appeals shifted course, holding that "MLRPC constituted a statement of public policy by this Court having the force and effect of law," Id. at 168, and therefore agreements made in violation of the MLRPC may be found to be unenforceable and subject the attorney to liability. In determining whether the violation makes the agreement unenforceable, "the court must look to all circumstances, including the nature of the violation, how it came about, the extent to which the parties acted in good faith, whether the violation has some particular public importance and whether the client, in particular, would be harmed by enforcing the agreement." Id. at 169. Obviously, violation of an ethics rule might also form the bases of a more traditional legal malpractice action helping to establish the second element of the cause of action.

One of the first cases in Maryland to follow the Post holding was Son v. Margolius, Mallios, Davis, Rider & Tomair, et. al., 349 Md. 441 (1998), in which the plaintiff sued his former attorney for negligent representation because the attorney had allegedly violated the MLRPC by sharing his fee with a non-lawyer. The lower court originally held that an alleged violation of the MLRPC was not valid grounds to hold the contract unenforceable, but the Court of Appeals, taking in account the recent Post holding, found that the lower court needed to take into consideration the factors listed in Post to determine if the plaintiff should prevail.

The drafters of the most recent MLRPC weighed in on the issues surrounding Post and Son by amending the Preamble to the Rules. A comment under the Scope section of the Preamble now reads:

> *Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached… The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability… Nevertheless, in some circumstances, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct. Nothing in this Preamble and Scope is intended to detract from Post v. Bergman and Son v. Margolius.*

Attorneys must be extremely conscious of the Rules of Professional Conduct to ensure that they will be able to collect their fees and avoid malpractice suits.

Seemingly, the drafters were cautious that the Post and Son holdings would be extended to the point that a violation of the MLRPC would be treated as a *per se* breach of an attorney's duty to his/her client and a basis for a legal malpractice action. In future cases, it will be interesting to see how narrowly or broadly the courts construe the holdings from Post and Son.

Similarly, the D.C. courts have adopted a similar view of the Rules of Professional Conduct as a basis of liability. The D.C. Court of Appeals held that a violation of the Code of Professional Responsibility, or the Rules of Professional Conduct, can constitute a breach of the attorney's fiduciary duty owed to the client. *Griva v. Davison*, 637 A.2d 830, 846-47 (D.C. 1994). The Court explained in further detail, that codified ethical standards of the profession, while not strictly providing "a basis for a civil action, nevertheless may be considered to define the minimum level of professional conduct required of an attorney, such that a violation of one of the DRs is conclusive evidence of a breach of the attorney's common law fiduciary obligations." *Id*.

Virginia courts, on the other hand, have rejected the notion that violations of the Rules of Professional Conduct provide a basis for the client to either void his contract with an attorney or to establish a breach of the standard of care.

The third element, which many people would break into the separate elements of proximate cause and damages, often leads practitioners in the field to discuss the concept of proving the "case within the case." Stated simply, even if the first two elements are established, unless the disgruntled client would have been able to succeed in the underlying "case" there is no legal malpractice. Thus, even with a breach of duty, if the client would not have prevailed in the underlying case, there simply is no legitimate cause of action against the attorney for negligence. *Taylor v. Feissner*, 103 Md. App. 356 (1993); *Goldstein v. Kaestner,* 243 Va. 169, 413 S.E.2d 347 (1992); *Adkins v. Dixon*, 253 Va. 275, 281-82, 482 S.E.2d 797, 801 (1997); *Niosi*, 69 A.2d at 60.

For example, if an attorney representing an injured party in an automobile accident fails to file suit within the statute of limitations, but can establish in the subsequent legal malpractice action that his client would not have prevailed even if suit had been filed in a timely manner, the action for malpractice will fail due to the failure to establish proximate cause. Similarly, if the damages that the client suffered would have occurred even in the absence of the attorney's error, there is no viable claim, as the client could not establish proximate causation. Moreover, this element also requires that the Plaintiff prove "collectibility" of damages. Thomas v. Bethea, 351 Md. 513 (1998); Glasgow v. Hall, 24 Md. App. 525 (1975); Duvall, Blackburn, Hale & Downey v. Siddiqui, 243 Va. 494, 497-98, 416 S.E.2d 448, 450 (1992); Lockhart v. Cade, 728 A.2d 65, 69 (D.C. 1999) (applying a "but for" test of damages, but allowing the trial court to determine its applicability). Therefore, in the foregoing example, even if the Plaintiff could establish that he would have won the auto tort lawsuit had it been filed in a timely fashion, if he is unable to establish that the Defendant in the underlying case would have been able to pay the judgment, the action for malpractice cannot be proven.

Just as is the case with regard to the elements of duty and breach, expert testimony may be required to prove the "case within the case," although this issue may create decidedly thorny problems if the expert is asked to provide an opinion concerning the probable outcome of the underlying case. The Virginia case of Whitley v. Chamouris, 265 Va. 9, 574 S.E.2d 251 (2003), illustrates this point. In that case, the Supreme Court of Virginia held that expert testimony was not required to establish proximate causation in a legal malpractice action. Chamouris hired Whitley to represent him in an action against his former employer. Whitley sued the employer in federal court, alleging racial discrimination, intentional infliction of emotional distress, tortious interference with contract, and defamation. One week prior to trial,. Whitley – without Chamouris' knowledge or consent – agreed to a voluntary dismissal with prejudice of all of Chamouris' claims except defamation, which he re-filed in state court and which was prosecuted to settlement by a different attorney. Chamouris then brought a legal malpractice action against Whitley based on the dismissal of the federal claims without his permission. Following an adverse jury verdict, Whitley argued on appeal that expert testimony was required to inform the jury whether Chamouris would have prevailed on his federal claims had they proceeded to trial. The Supreme Court rejected this argument, noting that "[t]he expert testimony Whitley maintains was necessary requires either a prediction of what some other fact finder would have concluded or an evaluation of the legal merits of Chamouris' claims. No witness can predict the decision of a jury and, therefore, the former could not be the subject of expert testimony." Chamouris, 265 Va. at 11, 574 S.E.2d at 253.

Virginia courts have rejected the notion that violations of the Rules of Professional Conduct provide a basis for the client to either void his contract with an attorney or to establish a breach of the standard of care.

Continued on page 4