

RECENT DEVELOPMENTS IN LEGAL MALPRACTICE JURISPRUDENCE

Presented by:

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Member

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PRACTICE AREAS:

[Intellectual Property Litigation](#)

[Professional Liability](#)

[Litigation](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. District Court for the Eastern
District of Pennsylvania

U.S. District Court for the Middle
District of Pennsylvania

U.S. Court of Appeals for the
Third Circuit

Supreme Court of the United
States

EDUCATION:

J.D., The Dickinson School of Law
of The Pennsylvania State
University, 1978

B.A., magna cum laude, Ithaca
College, 1975



Jeffrey P. Lewis

MEMBER

Jeff Lewis represents clients in all aspects of civil litigation, including legal malpractice, intellectual property, insurance broker/agent professional liability, insurance coverage, wrongful use of civil proceedings, abuse of process, wage payment collection, and other commercial litigation.

Jeff is admitted to practice before the Supreme Court of Pennsylvania, the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the Ninth Circuit, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the Middle District of Pennsylvania, and the Supreme Court of the United States. He has appeared before Courts in many Pennsylvania counties as well as in the courts of other states, including New Jersey, New York, Illinois, and California.

Jeff dedicates his time to serving the community and the legal profession, including recent service on the boards of Legal Aid of Southeast Pennsylvania, Community Impact Legal Services, Upper Uwchlan Township Municipal Authority, Advisory Committee to Villanova University Paralegal Program, the Editorial Board of *The Legal Intelligencer*, Zone Nine Delegate to the Pennsylvania House of Delegates, and the Chester County Bar Association Board of Directors. He currently serves on the Pennsylvania Bar Association Professional Liability Committee.

Jeff lectures frequently, mostly on legal professional liability issues for PBI, PBA Professional Liability Committee and the American Bar Institute.

For the last 10 years Jeff has written a monthly column on legal professional liability issues for a PBA journal, for which he has received a PBA Board of Governors' 2013 PBA Special Achievement Award.

Prior to joining Eckert Seamans, he was a shareholder in the law firm of McKissock & Hoffman, P.C.

PROFESSIONAL AFFILIATIONS

- Chester County Bar Association, Board of Directors (1984-86; 1998-2000); Executive Committee (1985); and Former Chair of Judicial Evaluation, Continuing Legal Education, and Membership committees
- Legal Aid of Southeast Pennsylvania, Inc., Board of Directors

- Community Impact Legal Services, Inc., Board of Directors and Former Chairman
- Pennsylvania Bar Association Professional Liability Committee, Co-Chair and Delegate from Zone 9, P.B.A. House of Delegates (2001- present)

COMMUNITY INVOLVEMENT

- Villanova Paralegal Advisory Board
- *The Legal Intelligencer*, Editorial Board
- Previously served on the Municipal Authority of Upper Uwchlan Township

AWARDS AND RECOGNITION

- Selected for inclusion in *Pennsylvania Super Lawyers*
- Awarded the 2013 PBA *Special Achievement Award* from the Pennsylvania Bar Association Board of Governors
- Attained an AV® Preeminent™ rating from Martindale-Hubbell

NEWS AND INSIGHTS

PUBLICATIONS

- ["What the Attorney Says in the Underlying Action Is Not an Admission in the Subsequent Malpractice Action"](#), *Pennsylvania Bar News*, June 2019.
- ["Electronic Social Media and Judicial Recusal – Revisited"](#), *Pennsylvania Bar News*, May 2019.
- ["Actionable Legal Malpractice: Tort or Breach of Contract?"](#), *Pennsylvania Bar News*, November 2018.
- ["Professional Liability Policy Does Not Cover for Intentional Bad Result or for Intentional Misconduct"](#), *Pennsylvania Bar News*, August 2018.
- ["Lender Funding Lawsuit Cannot Enforce Commitment by Counsel Representing the Client to Pay Lender Out of the Settlement Proceeds in His Escrow Account"](#), *Pennsylvania Bar News*, July 2018.
- ["The Viability of a Legal Malpractice Claim Rests Upon the Existence of Actual Harm"](#), *Pennsylvania Bar News*, May 2018.
- ["Can a Lawyer Who Has Formerly Withdrawn His Appearance Incur Liability for Subsequent Events in the Case?"](#), *Pennsylvania Bar News*, April 2018.
- ["Splitting Fee with a Nonlawyer"](#), *Pennsylvania Bar News*, February 2018.
- ["What is "Favorable Termination" for Purposes of Assert a Dragonetti Claim?"](#), *Pennsylvania Bar News*, January 2018.
- ["Speaking Up Upon Discovery of Inadvertently Disclosed Communications"](#), *Pennsylvania Bar News*, November 2017.
- ["Does a Fee-Sharing Agreement in Violation of a Rule of Professional Conduct Render it Unenforceable?"](#), *Pennsylvania Bar News*, August 2017.

- ["Dragonetti and Abuse of Process Claims Not Blocked by Application of Judicial Immunity"](#), *Pennsylvania Bar News*, April 2017.
- ["Malpractice for Failure to Sue the Deep Pocket"](#), *Pennsylvania Bar News*, January 2017.
- ["Must Counsel Anticipate Judicial Error?"](#), *Pennsylvania Bar News*, November 2016.
- ["Are Confidential Communications with a Firm's In-House General Counsel Really Privileged?"](#), *Pennsylvania Bar News*, September 2016.
- ["Contact with Former Employee of Opposing Party"](#), *Pennsylvania Bar News*, August 2016.
- ["Muhammad Revisited"](#), *Pennsylvania Bar News*, July 2016.
- ["Subject-Matter Conflicts Involving Patent Application"](#), *Pennsylvania Bar News*, June 2016.
- ["Can an Employee Use Privileged Communications Made to Employer's Counsel to Assert an 'Advice-of-Counsel' Defense?"](#), *Pennsylvania Bar News*, May 2016.
- ["The Consequences of the Failure of Corporate Counsel to Give Upjohn Warnings to Corporate Employees"](#), *Pennsylvania Bar News*, April 2016.
- ["Gist-of-the-Action Doctrine and Legal Malpractice"](#), *Pennsylvania Bar News*, March 2016.
- ["Lack of Privity Sinks Trademark Legal-Malpractice Claim"](#), *Pennsylvania Bar News*, February 2016.
- ["Legal Advice or Business Advice?"](#), *Pennsylvania Bar News*, January 2016.
- ["Is the Dragonetti Act Unconstitutional as Applied to Attorneys?"](#), *Pennsylvania Bar News*, November 2015.
- ["Lost Legatee Beneficiary Claims"](#), *Pennsylvania Bar News*, October 2015.
- ["Timely Reporting of a Claim"](#), *Pennsylvania Bar News*, July 2015.
- ["Collateral Estoppel Can Apply in Context of a Legal Malpractice Claim"](#), *Pennsylvania Bar News*, May 2015.
- ["Can a Carrier Rescind the Policy as Against Innocent Insured for Failure to Disclose Potential Claim on the Application?"](#), *Pennsylvania Bar News*, April 2015.
- ["Must a Client Appeal Underlying Matter Before Pursuing a Legal Malpractice Claim?"](#), *Pennsylvania Bar News*, December 2014.
- ["Does a Lawyer Owe a Duty to Explain Unambiguous Language to a Sophisticated Client?"](#), *Pennsylvania Bar News*, November 2014.
- ["Unenforceability of Unconscionable Engagement Letter"](#), *Pennsylvania Bar News*, October 2014.
- ["The Rules of Professional Conduct as Public Policy"](#), *Pennsylvania Bar News*, September 2014.
- ["A Client's Own Criminal Conduct Can Bar a Claim Against His or Her Lawyer"](#), *Pennsylvania Bar News*, August 2014.

- ["The Question of Privilege When Consulting the Law Firm's In-House Counsel"](#), *Pennsylvania Bar News*, July 2014.
- ["Judicial Error at Superseding Intervening Cause"](#), *Pennsylvania Bar News*, May 2014.
- ["Attorney's Death Before Statute of Limitation Has Expired Does Not Preclude Malpractice Claim"](#), *Pennsylvania Bar News*, April 2014.
- ["Is a Provision in an Engagement Letter Providing for Arbitration of Malpractice Claims Enforceable?"](#), *Pennsylvania Bar News*, March 2014.
- ["Suing a Client for Tortious Interference After Being Booted from a Law Partnership"](#), *Pennsylvania Bar News*, February 2014.
- ["Insurance Carrier Suing Insurance Defense Counsel for Malpractice"](#), *Pennsylvania Bar News*, December 2013.
- ["Can a Legal Malpractice Claim be 'Spun' as Fraudulent Misrepresentation?"](#), *Pennsylvania Bar News*, November 2013.
- ["Can the Bank be Liable for a Loss of Trust Account Money Resulting from a Phishing Scam?"](#), *Pennsylvania Bar News*, October 2013.
- ["Is There Malpractice Claim for Negligence That Causes the Government to Discover and Deport an Illegal Alien?"](#), *Pennsylvania Bar News*, September 2013.
- ["Does an Unimpeached Guilty Plea in a Criminal Proceeding Bar Recovery in a Legal Malpractice Action?"](#), *Pennsylvania Bar News*, August 2013.
- ["Can Failure to Make the Effective Argument Sooner State a Malpractice Claim?"](#), *Pennsylvania Bar News*, June 2013.
- ["Does Counsel's Assurance Toll the Statute of Limitations?"](#), *Pennsylvania Bar News*, April 2013.
- ["Error-in-Judgment Rule Might Not Protect Where Law Is Unsettled"](#), *Pennsylvania Bar News*, March 2013.
- ["Malpractice Claim Requires Proof of Damages"](#), *Pennsylvania Bar News*, February 2013.
- ["Litigation Privilege Does Not Bar Malpractice Claim"](#), *Pennsylvania Bar News*, December 2012.
- ["Opinion Letter May Be Actionable Under RICO"](#), *Pennsylvania Bar News*, November 2012.
- ["Even When Not in Doubt, Always Disclose a Potential Claim"](#), *Pennsylvania Bar News*, October 2012.
- ["Can Counsel be Liable for Malicious Prosecution for the Conduct of Associated Counsel Who is Primarily Responsible for the Conduct of a Case?"](#), *Pennsylvania Bar News*, September 2012.
- ["Proving the 'Case Within a Case'"](#), *Pennsylvania Bar News*, August 2012.
- ["Could Lawyers Face Claims for Negligent Infliction of Emotional Distress?"](#), *Pennsylvania Bar News*, June 2012.
- ["The Differing Views Between State and Federal Case Law of Legal Malpractice as a Breach of Contract"](#), *Pennsylvania Bar News*, April 2012.

- ["Avoiding Personal Liability on a Client's Contract"](#), *Pennsylvania Bar News*, March 2012.
- ["Automated Communication Between Lawyer and Client"](#), *Pennsylvania Bar News*, December 2011.
- ["Read the Policy Fine Print When There is a Potential Claim!"](#), *Pennsylvania Bar News*, November 2011.
- ["Duty to Warn Client to Protect Confidentiality of Electronic Communications with Counsel"](#), *Pennsylvania Bar News*, October 2011.
- ["Must a Lawyer Try to Find Another Expert to Support a Client's Legal Position Where the Chosen Expert May Not Fully Do So?"](#), *Pennsylvania Bar News*, September 2011.
- ["Can an Attorney be Liable for Harm Resulting from Misinformation Given to a Prospective Client?"](#), *Pennsylvania Bar News*, August 2011.
- ["Can a Lawyer Speak Out Against the Project of a Former Client?"](#)
- ["When Does the Clock Begin Ticking on a Legal Malpractice Claim?"](#), *Pennsylvania Bar News*, June 2011.
- ["Litigation Activity as Basis for Debt Practices Collection Claim"](#), *Pennsylvania Bar News*, May 2011.
- ["E-Mail Purloined by Opposing Party"](#), *Pennsylvania Bar News*, April 2011.
- ["Does Federal District Court Have Exclusive Jurisdiction Over Legal Malpractice Claims Involving Patents?"](#), *Pennsylvania Bar News*, March 2011.
- ["When an Expert Opinion is Required to Support a Certificate of Merit in a Professional Liability Action"](#), *Pennsylvania Bar News*, February 2011.
- ["Can a Prospective Beneficiary Sue If the Intended Will Does Not Get Drafted or Executed in Time?"](#), *Pennsylvania Bar News*, January 2011.
- ["Another Consideration of Rule 1925\(b\) and Waiver"](#), *Pennsylvania Bar News*, December 2010.
- ["Professional Judgment and Speculative Damages in Transactional Malpractice"](#), *Pennsylvania Bar News*, November 2010.
- ["Is Notice of a Claim to a Former Partner Notice to the Former Firm?"](#), *Pennsylvania Bar News*, October 2010.
- ["No Malpractice Claim Unless the Actual Client Sustains Damages"](#), *Pennsylvania Bar News*, September 2010.
- ["Advising a Client of the Potential for Deportation"](#), *Pennsylvania Bar News*, August 2010.
- ["Bankruptcy Abuse and Lawyers"](#), *Pennsylvania Bar News*, July 2010.
- ["Error of Law Defense Not Recognized Under Federal Fair Debt Collection Law"](#), *Pennsylvania Bar News*, June 2010.
- ["Is a Certificate of Merit Required in a Professional Liability Action by a Non-Client Against a Lawyer? – Revisited"](#), *Pennsylvania Bar News*, May 2010.
- ["The BAPCPA as it Impacts Consumer Bankruptcy Lawyers"](#), *Pennsylvania Bar News*, April 2010.

- ["Are Confidential Communications from Attorney to Client Subject to Attorney-Client Privilege?"](#), *Pennsylvania Bar News*, March 2010.
- ["Are Lawyer-Client E-mails Sent on the Computer of Client's Employer Privileged?"](#), *Pennsylvania Bar News*, February 2010.
- ["Malpractice Claim for Failure to Record a Right of First Refusal"](#), *Pennsylvania Bar News*, January 2010.

SPEAKING ENGAGEMENTS

- "Professional Liability: What You Don't Know May Hurt You," Ethics and Professional Practice Workshop, American Law Institute, December 2014.
- "Ethics: Title Litigation Claims, Transactions Gone Wild and Other Real Estate Disclosures: How To Avoid Ethical Nightmares," Real Estate Institute in Philadelphia, Pennsylvania Bar Institute, December 2013.
- "2013 Attorney Professional Liability Update," co-presenter, General Practitioners' Update, Pennsylvania Bar Institute, June 2013.
- "Ethical Perils in Commercial Practice--Who Really Is Your Client," 16th Annual Real Estate Institute in Philadelphia, Pennsylvania Bar Institute, December 2012.
- "Avoiding Legal Malpractice," Monroe County Bar Association, March 21, 2012.
- Lectured for Continuing Legal Education programs sponsored by the Pennsylvania Bar Institute, Chester County Bar Association, and the Professional Liability Committee of the Pennsylvania Bar Association.

2019 Update: LEGAL PRIMER

Recent Developments in Legal Malpractice Jurisprudence

Presented by:

Jeffrey P. Lewis, Esq.

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ATTORNEYS AT LAW



August 8, 2019

Attorney's Signature



- Attorney's signature approving settlement agreement as to form and content could demonstrate intent to be bound by substantive provisions.

Monster Energy Co. v. Schechter

19 Cal. Daily Op. Serv. 6680, --- P.3d ---- (2019)

Supreme Court of California

Decided July 11, 2019



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Parameters of Attorney/Client and Attorney Work Product Privileges



- Latest Discussion by High Court concerning parameters of Attorney/Client and Attorney Work Product Privileges.

Bousamra v. Excelsa Health
2019 WL 2509384
Supreme Court of Pennsylvania
Decided June 18, 2019



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Consequences for Forcing Disclosure of Attorney-Client Privileged Communications



City of San Diego v. Superior Court of San Diego County
30 Cal. App.5th 457, 241 Cal. Rptr.3d 604
Court of Appeals, Fourth District, Division 1, California
Decided December 19, 2018



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Defamatory Statements About Opposing Party



- Defense counsel making defamatory statements to the press about the opposing party.

Dickinson v. Cosby

2019 WL 3369427

Court of Appeal, Second District, Division 8, California

Decided July 26, 2019



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Disclosure of Malpractice



- Considers whether Rule 1.4 of the California Rules of Professional Conduct requires lawyer to disclose to client that he or she has sought outside counsel because he or she believes that they may have committed malpractice.

Formal Opinion No. 2019-197

State Bar of California Standing Committee on
Professional Responsibility and Conduct

Issued in 2019



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Limitation of Scope of Representation Stated in Engagement Letter



Attallah v. Milbank, Tweed, Hadley & McClay, LLP
168 A.D.3d 1026, 93 N.Y.S.3d 353, 2019 N.Y. Slip. Op. 00583
Supreme Court of New York, Appellate Division
Decided January 30, 2019



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Consequences of Failure to Formally Terminate the Attorney-Client Relationship



McGuinnis v. Johnson
243 Cal. App. 4 602, 196 Cal. Rptr.3d 662
Court of Appeals, Sixth District, California
Decided December 30, 2015



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Malpractice Action Admissibility



- What attorney says in underlying matter is not deemed an admission in the subsequent malpractice action.

Power Control, Inc. v. Lerner

437 P.3d 66
Kansas Court of Appeals
Decided January 25, 2019

Ammon v. McCloskey

655 A.2d 549
Superior Court of Pennsylvania
Decided 1995



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Electronic social media and judicial recusal



Law Offices of Hersein & Hersein, P.A. v. United Services Automobile Association

2018 WL 5994243, --- So.3d ----
Supreme Court of Florida
Decided November 15, 2018

In Re The Paternity of B.J.M.: Miller v. Carroll

2019 WL 761649
Court of Appeals of Wisconsin
Decided February 20, 2019



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The “Hot Potato” Rule



Regal Cinemas, Inc. v. Shops At Summerlin North

2017 WL 4075760

United States District Court for the Eastern District of California

Decided September 13, 2017

Rule 1.7 of the California Rules of Professional Conduct



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Individual or Trust as an Intended Third Party Beneficiary of a Legal Malpractice Claim



Security Bank & Trust Company v. Larkin, Hoffman, Daily & Lindgrin, Ltd.

916 N.W.2d 491

Supreme Court of Minnesota

Decided June 27, 2018

Guy v. Liederbach

459 A.2d 744

Supreme Court of Pennsylvania

Decided 1983



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Client Must Show Actual Damages to Establish Legal Malpractice Claim



Servin v. Duane Morris, LLP

2018 WL 1280520

Superior Court of Pennsylvania (3 judge panel) (non-precedential)

Decided March 13, 2018

Kituskie v. Corbman

714 A.2d 1027

Supreme Court of Pennsylvania

Decided 1998



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Continued Representation by Lawyer after Withdrawing Appearance can be Implied



Cesso v. Todd

82 N.E.3d 1074

Massachusetts Court of Appeals

Decided 2017



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Discovery of Inadvertently Disclosed Communications by Opposing Counsel



McDermott Will & Emery, LLP v. The Superior Court of Orange County

217 Cal. Rptr.3d 47, 10 Cal.App.5th 1083

Court of Appeals, Fourth District, Third Division

Decided April 18, 2017, Review denied June 14, 2017



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Suing the Other Side's Lawyer for Making a Mistake in Drafting Transactional Documents



Oakland Police & Fire Retirement System v. Mayer Brown LLP

861 F.3d 644

United States circuit Court of Appeals for the Seventh Circuit

Decided 2017



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Judicial Immunity not Defense to Claims of Wrongful Use of Civil Process (“Dragonetti”) and Abuse of Process



Freundlich & Littman, LLC v. Feirstein

157 A.3d 526

Superior Court of Pennsylvania (3 judge panel)

Decided February 23, 2017, Reargument denied May 2, 2017



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Questions?



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