The Differing Views Between State and Federal Case Law of Legal Malpractice as a Breach of Contract

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Under older Pennsylvania case law, stating a claim for legal malpractice as a breach of contract as opposed to sounding in tort required the showing that the lawyer's failure "to follow a specific instruction of the client" breaches an express term of the agreement employing the lawyer. The trio of leading cases that supported this proposition were all decided by three-judge Superior Court panels. In diversity cases, federal district courts followed suit. However beginning with *Gorski v. Smith*, 812 A.2d 683 (Pa.Super. 2003), a seminal case that stands for several different principles of legal malpractice jurisprudence, another three-judge panel rejected this "restricted view," finding that implied in every agreement is a commitment by the attorney to provide competent services. The Superior Court based their decision upon a more recent holding by the Pennsylvania Supreme Court in *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993), in which that court stated: "Of course an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large."

The court in *Gorski* noted that a three-judge panel in *Fiorentino v. Rapaport*, 693 A.2d 208 (Pa.Super. 1997), *appeal denied*, 701 A.2d 577 (1997), cited *Bailey* with approval in its own recognition of a breach of contract claim based upon the lawyer's negligence.

What makes this an interesting development is that federal district courts in diversity cases, when confronted with claims for legal malpractice sounding in assumpsit, continue to honor the older case law and ignore *Bailey*, *Fiorentino* and *Gorski*. The courts could argue that the quoted language from *Bailey* be regarded as dicta only, and therefore not binding as the ultimate pronouncement of state law, and that *Fiorentino* and *Gorski* are persuasive authority only. But what is curious in the federal opinions on this point, as read by this author, is that this later case law is not even acknowledged and thus is not rejected or distinguished. This happened most recently in a Middle District case.

In *Javaid v. Weiss*, 2011 WL 6339838 (M.D.Pa.), a client sued his lawyer who had counseled him concerning, among other things, a guaranty he gave as part of a commercial loan. The guaranty contained a confession of judgment provision, which the lender could utilize upon default. The lawyer had also represented the client more recently in proceedings that resulted from defaults of the loan. The ability to assert an assumpsit action was critical because the client was confronted with a statute of limitations issue with respect to the trespass theory.

In granting the lawyer's motion to dismiss without prejudice (so that the client could plead over), the court found that the client had not "adequately pled a separate claim for breach of contract, but … instead simply repackaged his allegations of negligence and recast them as a breach of contract claim." Relying in part on Superior Court case law dating to even before *Bailey*, the court drew the distinction previously drawn by other federal district courts that assumpsit claims are limited to theories involving "a lawyer's failure to follow instructions. …" The court also acknowledged that a breach of contract claim would only grant "compensatory damages appropriate in contract. …"

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Why is it important which view a court takes with respect to the contours of legal malpractice as a breach of contract? From the client's standpoint, the difference can be whether the claim is time barred. Legal malpractice as a tort is subject to a two-year statute of limitations whereas a breach of contract is subject to a four-year statute. From the lawyer's standpoint — and this case law has developed little since *Bailey* — the difference could mean a difference in the measure of damages. The damages in *Bailey* were limited to disgorgement of fees. But that opinion did not make it clear why disgorgement was deemed the appropriate measure of damages. It could have been that the court viewed disgorgement as the appropriate measure of damages for all such claims sounding in breach of contract or it could have been premised upon the concept that a criminal should not be allowed to profit from his or her crime (such as being allowed to earn profits from a book written about the crime).

In addition to the statute of limitation and damages questions, how the distinction is drawn between legal malpractice as a tort and as a breach of contract also raises an issue with respect to defenses. Contributory negligence (as opposed to comparative negligence) is a defense to a legal malpractice claim sounding in tort. But is it a defense to a breach of contract claim that is premised upon the lawyer's negligence? Although the *Gorski* court did not expressly state that a distinction must be drawn between negligence claims sounding in tort and those sounding in breach of contract, the court appeared to take great care in discussing the defense to "negligence" claims without drawing any distinction between tort and assumpsit. In fact there is at least one decision from the highest court of another state (Massachusetts) in which the client's fault is recognized as a defense to a "negligence" claim sounding in breach of contract.

What should the practitioner do if the client does not present a claim until the two-year statute has run? Unless the claim involves a failure to follow the client's instruction, the case should be brought in state court. Unfortunately this may not provide complete protection should the defendant lawyer have a basis to remove the case to federal court based upon diversity jurisdiction and therefore implicate the federal case law interpretation of legal malpractice as a breach of contract.