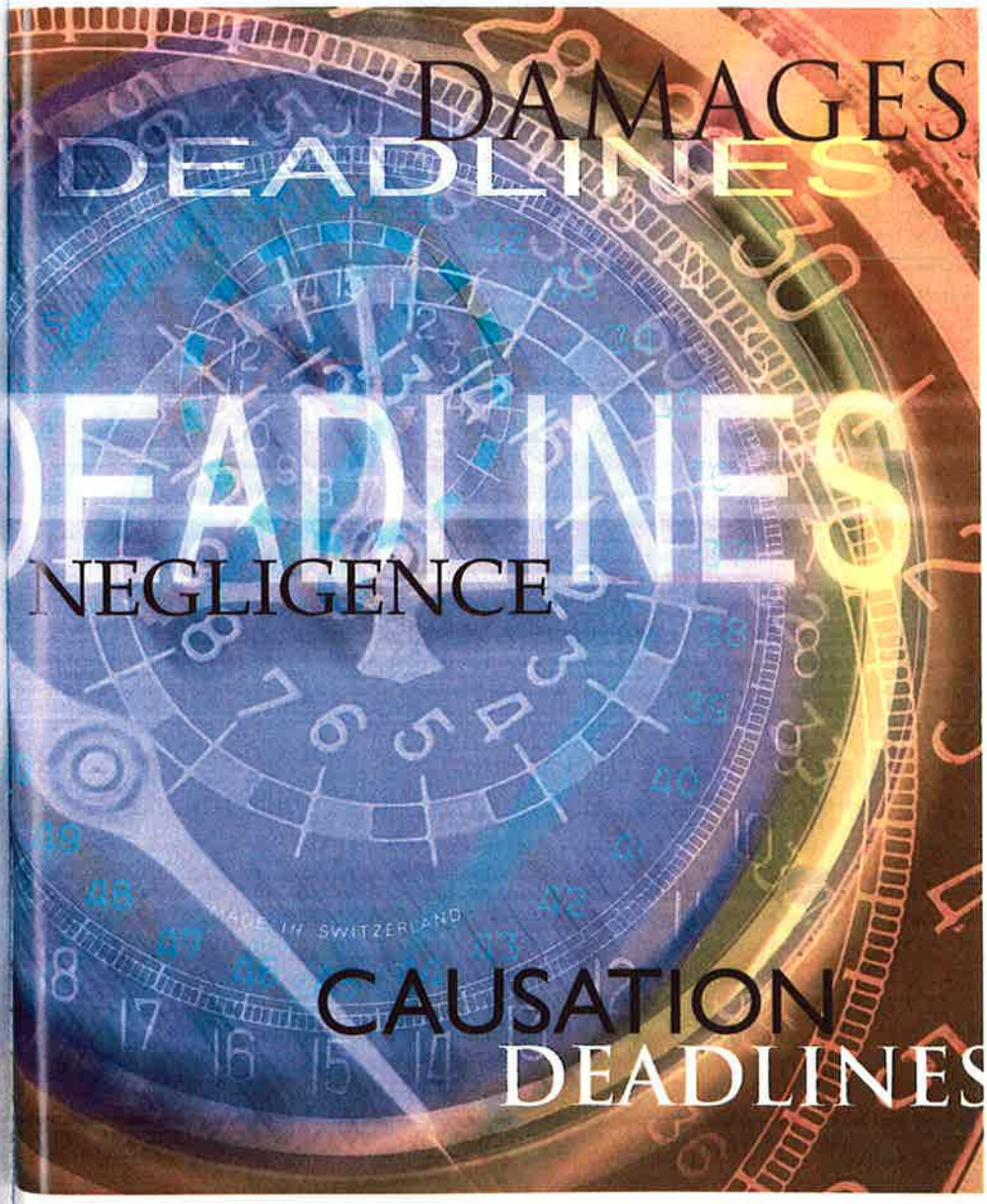
# NEGLIGENCE CLAIMS AGAINST BARRISTERS

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This paper provides an introduction to the law relating to allegations of negligence against lawyers and identifies some of the practical considerations when prosecuting such claims.

## I. INTRODUCTION

A successful malpractice suit against a barrister requires the usual elements in negligence to be proven:

1. the lawyer owed a duty of care;
2. the lawyer breached that duty of care through negligence or mistake;
3. causation; and
4. damages.

The most common mistake lawyers make is missing limitation dates. One in every four reports to the Lawyers Insurance Fund is the result of a missed deadline or missed limitation date. Obviously, where a limitation date has been missed, it is a relatively straight forward to prove the negligence. However, in practical terms, suing a lawyer is always more complicated than merely establishing the legal error. Not only must one prove the error, but one must prove that the underlying case would have been successful had it not been mishandled.

Much more difficult to prove are allegations of mishandling a claim leading to an improvident settlement or the mishandling of a trial. This paper addresses these more difficult claims.

## II. GENERAL DUTY OF CARE

*Tiffin Holdings Ltd.* v. *Millican et al* (1964), 49 DLR (2d) 216 (Alta SC) aff'd (1967) SCR 183, contains the following often quoted definition of the duty of care owed by a lawyer to a client:

(a) to be skilful and careful;
(b) to advise his client on all matters relevant to his retainer, so far as may be reasonably necessary;
(c) to protect the interests of the client;
(d) to carry out his instructions by all proper means;
(e) to consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him; and
(f) to keep his client informed to such an extent as may be reasonably necessary according to the same criteria.

The standard to which a lawyer is held is that expected of a reasonably competent and diligent lawyer practicing in the same community at the time in question (*Startup* v. *Blake*, 2001 BCSC 8, at para. 68). This standard is sometimes described in the case law as the "ordinarily competent" or the "ordinarily prudent" lawyer (*Central Trust Company* v. *Rafuse*, [1986] SCJ No. 52 at para. 58). It is not enough to show that the lawyer made an error of judgment or was ignorant of some part of the law. Rather, to prove professional negligence, it must be shown that a reasonably competent lawyer would not have made the error or shown the ignorance in question. The standard is one of reasonableness and not perfection (*Carlsen* v. *Southerland*, 2006 BCCA 214 at paras. 10-15).

The test is nebulous as is underscored by the following comment made by Riley, J. in *Tiffin*:

> "It is extremely difficult to define the exact limits by which the skill and diligence which a lawyer undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between the reasonable skill and diligence which appears to satisfy his undertaking. It is a question of degree, and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed."

The difficulty in addressing whether certain conduct is negligent is further compounded by a requirement that the standard to which a lawyer is judged includes geographical considerations; lawyers are to be judged against the standard of practice of those practicing in the same area (*Hauck* v. *Dixon* [1975] 10 OR (2d) 605; *Stronghold Investments Ltd.* v. *Renkema* (1984) BCJ No. 2863, BCSC). This does not mean that a lawyer is necessarily excused because he is surrounded by lawyers with a very low standard of practice. The Supreme Court of Canada has said that evidence of the prevailing practice is relevant but is not determinative of negligence. In *Roberge* v. *Bolduc*, [1991] 1 SCR 374 at paras. 184 to 185, a negligence action against a notary public, Madam Justice L'Heureux-Dubé stated:

> "This brief overview of both doctrine and jurisprudence indicates that courts have discretion to assess liability despite uncontradicted evidence of common professional practice at the relevant time. The standard, in regard to the particular facts of each case, must still be that of a reasonable professional in such circumstances.
>
> .... The fact that a professional has followed the practice of his or her peers may be strong evidence of reasonable and diligent conduct, *but it is not determinative.* If the practice is not in accordance with the general standards of liability, i.e., that one must act in a reasonable manner, then the professional who adheres to such a practice can be found liable, depending on the facts of each case. (emphasis added)

It is not just the lawyer's conduct against which negligence is measured. A lawyer's conduct will be judged against the background of the client's instructions, experience and level of sophistication (*Ormindale Holdings Ltd.* v. *Ray, Wolfe, Connell, Lightbody & Reynolds* [1980] BCJ No. 1969 at paras. 33-34 and 39-40 (BCSC); aff'd [1982] BCJ No. 1899 at paras. 10 and 11 (BCCA); and *Lenz* v. *Broadhurst Main* [2004] OJ No. 288 at para. 47-54 (Ont. Superior Court)). Obviously, a lawyer should take a different approach when giving advice to a sophisticated businessman than when advising a client who is unsophisticated or who has, for example, a language issue or has suffered brain damage.

## III. DUTY TO GIVE ADVICE

One of the areas where courts appear to be willing to find negligence is when a lawyer fails to give proper advice, particularly concerning risks.

The court in *Girardet* v. *Crease & Company* (1987), 11 BCLR (2d) 361 held that it is part of the duty of a good lawyer to give good advice and to make the reasons for that advice clear to the client. A client has the right to know the basis of the advice so that he or she can make an informed decision.

When giving advice, a lawyer has a duty to warn a client of the risks involved in considering a course of action contemplated either by the client or the lawyer on his or her behalf. The lawyer must exercise reasonable care and skill in so advising the client. A failure to properly advise a client of the risks involved in considering a course of action contemplated either by the client or the lawyer on his or her behalf is a breach of the solicitor's duty of care. *Major* v. *Buchanan et al.* (1975), 61 DLR (3d) 46 (Ont HC); *Graybriar Investments Ltd.* v. *Davis & Co.* (1992), 72 BCLR (2d) 1904 (CA); and *Zink* v. *Adrian* 2005 BCCA 93. A reasonably competent lawyer gives advice with respect to the potential effects of a course of action as well as alternate options (*Midland Mortgage Corp.* v. *Jawl and Bundon*, [1997] BCJ No. 473; and *Solmundson* v. *Bull Housser & Tupper*, 2000 BCSC 1640).

Chapter III, Rule 1 of the Canadian Bar Association Code of Professional Conduct Handbook describes the standard of conduct for a lawyer giving advice as follows:

> The lawyer's duty to the client who seeks legal advice is to give the client competent opinion based on sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyers own experience and expertise. The advice must be open and undisguised, clearly disclosing what the lawyer honestly thinks about the merits and probable results.

The footnote for that Rule states: "The lawyer should not remain silent when it is plain that the client is rushing into an 'unwise, not to say disastrous adventure,' " referencing Lord Danckwerts in *Neushal* v. *Mellish & Harkavy* (1967), 111 Sol. Jo. 399 (CA).

Madam Justice Southin (as she then was) made it clear that a lawyer does not have to press the advice with the client in the following words from *Girardet* v. *Crease & Co.*, (1987) 11 BCLR (2d) 361 @ 370-371:

> "In my view it is part of the duty of a solicitor not only to give good advice but also to make his reasons clear to the client. That does not mean writing the client page after page of legal jargon which, to most clients, is unintelligible. But a client has the right to know why. How else can she make an informed judgment on the matter at hand?
>
> The defendant is a quiet man. He was not, on his own account, forcible in the explaining of his reasons. But if the client has stopped her ears against unpalatable advice, in the sense of the reasons, can she later assert that the solicitor was negligent in not forcing her to listen? I think not....
>
> Now a first-rate solicitor does all he can by explaining his position again and again, if necessary, to save a client from the consequences of the client's own folly – sometimes a very wearying endeavour – but a solicitor who does not go further than quietly giving his advice and reasons once, as I find the defendant did, cannot be considered in breach of his duty of reasonable care and skill."

## IV. ADVERSE INFERENCE

A failure to keep notes or to confirm advice in writing can potentially lead to an adverse inference drawn against the lawyer. When there is a conflict between the recollection of a client and that of the lawyer regarding the scope of a lawyer's retainer, all else being equal, the version of the client is to be preferred. (*Morton* v. *Harper Grey Easton* [1995] BCJ No. 1356).

## V. NEGLIGENCE IN THE CONDUCT OF A PROCEEDING

Canadian courts have been reluctant to find negligence for decisions made by lawyers in the "heat of the battle". The Ontario High Court of Justice in *Demarco* v. *Ungaro et al*, (1979), 21 OR (2d) 673 rejected the English "barrister's immunity" rule on the grounds that it was against public interest (i.e., the administration of justice did not require that lawyers be immune from actions in negligence). The court recognized that, in theory, there could be cases where the error was so shocking that a court would conclude it was negligence but: "[it is] difficult to believe that a decision made by a lawyer in the conduct of a case will be held to be negligence as opposed to a mere error of judgment".

The fact that most other lawyers would have conducted the case differently, does not lead to a finding of negligence. Matters of judgment, upon which competent counsel may disagree, do not equate to matters of care and skill (*Belknap* v. *Meakes* (1989) DLR (4th) 452 at p. 473 (BCCA); and *Urban* v. *Murphy* [2004] BCJ No. 1905 at paras. 66 and 67). Every lawyer has had the experience of hearing as many different opinions expressed on an issue as the number of lawyers expressing those opinions. As professionals, lawyers must have confidence in being able to exercise their judgment without fear of being second guessed, with the benefit of hindsight (*Lapointe* v. *Hôpital Le Gardeur* [1992] 1 SCR 351 at pp 362-363; *ter Neuzen* v. *Korn* (1995) 11 BCLR (3d) 201 at para. 34; *LaFleur* v. *Murphy* 2002 BCSC 986 at para. 87). That confidence means that it is very difficult to establish negligence against a lawyer. A lawyer is well advised to exercise serious reflection before advancing a claim on behalf of a client who complains that they do not like what their former lawyer did for them.

The case law reflects that lawyers should remain free to make "judgments" about strategy including who to sue, what allegations to pursue, what evidence to lead, when to cross-examine and what objections to make and that negligence will only be found where there is "egregious" error in the conduct of the trial. A recent case that has a helpful review of the law in this area is *Nichols* v. *Warner, Scarborough, Herman & Harvey* 2007 BCSC 1383.

There are times a lawyer finds themselves at the mercy of the skill and expertise of the experts retained to assist in the preparation of a case for trial. Is a lawyer exposed to a claim of negligence as a consequence of an expert's failings? For example, when a neurologist retained to conduct a medical examination fails to properly diagnose a head injury or an engineer incorrectly calculates the speed of the plaintiff's vehicle? The answer is no; a lawyer is not required to act as a "sort of amateur physician or psychiatrist" and question the expert's findings *Ainscough* v. *Rankin, Bond & McMurray*, [1997] BCJ No. 2500 at para. 122 (SC), aff'd 2000 BCCA 571; *Nichols* v. *Warner, Scarborough, Herman & Harvey* 2007 BCSC 1383.

## VI. NEGLIGENT SETTLEMENT OF ACTION

Special considerations apply in circumstances where the plaintiff alleges that a lawyer was negligent in settling a claim. A mere error of judgment will not give rise to a liability in such cases and negligence is only found in the clearest of cases (*Startup, supra*). The system encourages and fosters settlement and the courts loathe to second guess, with the benefit of hindsight, counsel's advice around settlement. Negligence will be found in circumstances where there has been improper preparation of a case leading to an improvident settlement so that a client is not able to make an informed decision about the settlement.

In *Startup, supra*, the plaintiff alleged that the defendant lawyer did not understand his client's medical condition or the uncertainties associated with his future and negligently advised him to accept an inadequate settlement of his motor vehicle accident claim. The plaintiff's allegations were rejected. Importantly, the court found that the lawyer in question had an adequate understanding of the plaintiff's medical condition and was aware of the uncertainties in his client's future. The court concluded that the lawyer had specifically advised his client regarding the fact that the settlement was speculative and, as a consequence of that advice, the plaintiff understood and accepted the risk associated with settling his case. On those circumstances, the professional negligence claim was dismissed.

A lawyer *will* be found negligent in settling a case where he or she fails to consider all proper heads of damages, fails to asses the value of the claim, or properly fails to research the issue of liability. Even if the client consents to the settlement in such circumstances, that consent is not informed, as the client was relying on deficient advice (*Alberta (Workers' Compensation Board)* v. *Riggins* (1990), 107 AR 314, aff'd [1992] AJ No. 812).

If a lawyer urges a plaintiff to unfavourably settle a motor vehicle accident claim based on advice that the plaintiff would not succeed on liability, he or she will be found negligent if there has been a failure to interview a witness who could have corroborated the plaintiff's evidence regarding the circumstances of the accident (*Fawell et al* v. *Atkins et al* (1981), 28 BCLR 32 (BCSC)).

In *Fawell*, a lawyer was found to be negligent for having provided advice to his clients when he had failed to interview an important witness, Ms. Davidson, who would have been of assistance to his client on the issue of liability. Ms. Davidson corroborated the plaintiff's version of how the accident had occurred and contradicted that of another independent witness. Although the lawyer and the plaintiff met with Ms. Davidson at the courthouse on the morning of trial, Ms. Davidson's evidence was not discussed and the lawyer urged the plaintiffs to settle based on his view that liability was risky. Fearful of the economic consequences of failure, as described by counsel, the plaintiff reluctantly agreed to settle. Mr. Justice Verchere found, however, that the plaintiff had not been fully informed or properly advised of the effect of Ms. Davidson's evidence and had this occurred, the plaintiff would not have agreed to settle "despite the well-known difficulty in forecasting the outcome of litigation".

## VII. EXPERT OPINION

In my opinion, counsel pursuing a claim for negligence against a barrister should always be armed with an expert opinion that addresses the reasonable standard of care. The expert should be retained at the outset of the action and used as a resource in the preparation for your discovery of the defendant. The expert should be given access to the entire original file including all pleadings, expert's reports, clinical records, discovery transcripts, correspondence, witness statements, police files, etc.

It is, however, clear that the court does not have to rely upon any opinion evidence placed before it and can come to conclusions of negligence independent of expert opinion (*Nichols, supra*). For example, in complex cases courts have been hesitant to accept the expert evidence of witnesses, stating that each case must be determined on its facts (*R. & L. Contracting Ltd.* v. *A and B and others* [1981] BCLR 342 (BCCA)).

*R & L Contracting* cited with approval the following passage from *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs and Kemp*, [1978] 3 All ER 571 at 582:

> "The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the Defendants, is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, his solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide."

In *Roberge, supra*, L'Heureux-Dubé J. stated that: "[a]s regards legal professional liability the admissibility of expert testimony has always been accepted". Indeed, in *Gauvreau* v. *Paci* [1996] OJ No. 2396, in allowing the appeal of a lawyer against whom a case in negligence had been made, the Ontario Court of Appeal held that insufficient evidence had been called by the plaintiff on the standard of care and he should have called expert opinion evidence on the issue of a reasonably prudent lawyer in the geographical area.

## VIII. PROVING DAMAGES

Once there has been a determination that there has been a breach of the duty of care owed to the plaintiff, the court must then determine whether any damages flow from that breach. The plaintiff carries the onus to prove that a loss was suffered and that the loss has a real value. At paragraph 9 of *Cridge* v. *de Vooght*, 2004 BCSC 101, Madam Justice Satanove observed:

> The courts have often referred to lawyers' negligence cases as containing a "trial within a trial". Simply put, in order to assess damages caused by a lawyer's negligence in the context of litigation, a plaintiff must show that if the lawyer had exercised a reasonable degree of skill and care the plaintiff would have had a reasonable prospect of success in the litigation (*Hagblom* v. *Henderson*, [2003] 7 WWR 590 (Sask CA); *Gorieu* v. *Simonot*, [1982] 6 WWR 221 (Sask QB); *Prior* v. *McNab* (1976), 16 OR (2d) 380 (HCJ)).

There must be established a "reasonable probability of realizing an advantage of real monetary value" (*Cridge, supra*, at para. 12; and *Nichols* v. *Warner, Scarborough, Herman & Harvey*, 2007 BCSC 1383).

For example, in a case arising from a missed limitation period in a car accident claim, the plaintiff must prove the solicitor's negligence (easily done) and also prove that he or she would have succeeded in the original car accident claim. In effect, the plaintiff must conduct two separate trials. All of the necessary evidence must be called to prove the hypothetical car accident claim. That includes any and all necessary eye witnesses to the accident, any necessary engineering or police evidence and any necessary physical evidence to prove negligence against the original would-be defendant in the underlying MVA claim. In addition, evidence must be called to prove the damages portion of the hypothetical car accident claim including all of the relevant lay evidence from the plaintiff, family and friends describing the impact of the injuries and all the appropriate expert evidence such as medical, vocational, accounting, actuarial, etc. For all intents and purposes the defendant lawyer steps into the shoes of the original would-be defendant and must call the evidence that would have been led in defence of the hypothetical underlying claim.

The court must attempt to replicate, in as close a fashion as possible, how the original trial would have been conducted (*Prior et al* v. *McNab*, 16 OR (2d) 380 (Ont. High Court). This exercise can give rise to interesting practice issues. For example, should the plaintiff be permitted to read in the original car accident defendant's discovery evidence as part of the "trial within a trial"? Mr. Justice Hinkson recently ruled against this proposition during the course of the trial in *Chaster* v. *LeBlanc*. Should the plaintiff be permitted to rely upon admissions made by the original car accident defendant? Can the defendant lawyer rely upon damaging expert evidence obtained by him or her on behalf of the plaintiff in the original action and which, because of the claim of privilege, would never have seen the light of day? Can either party cross-examine using original statements that would have remained privileged (and only part of opposing counsel's brief)? What happens if the original defendant or another critical witness has died? Counsel should be alive to and address these important strategic issues as part of the trial preparation.

The damages which are awarded in a solicitor's negligence action are based on the loss of an opportunity. If a limitation period is missed or a case is improvidently settled, the plaintiff has lost the opportunity to bring a proceeding or to succeed in a trial.

The Alberta Court of Appeal addressed the potential outcomes (in a missed limitation claim) in *Fisher* v. *Knibbe*, (1992), 3 Alta LR (3d) 97 as follows:

> After conducting the "trial within a trial" to determine what damages, if any, a negligent solicitor is liable for missing a limitation, three results are possible. First, the trial judge could find that had the case gone to trial the plaintiff would have been successful and in such case 100 per cent of the lost damages would be awarded against the solicitor. Second, the trial judge could

find that the plaintiff would not have been successful therefore only nominal damages may be awarded against the solicitor. Finally, where time has passed to such an extent that a "trial within a trial" would be impossible, then the court must to the best of its ability calculate the value of the opportunity lost to the plaintiff and award damages against the solicitor on that basis.

The assessment of damages is easy in circumstances where it is clear that the original action would have succeeded. It is the measure of the loss (i.e., what would have been recovered in the original claim) less the unrecoverable legal costs (i.e., after recovery of the taxable costs and disbursements) that would have been incurred in pursuing the original action and less any settlement paid (*Chaster* v. *LeBlanc*, 2007 BCSC 1250).

*Chaster* is a recent example of a case in which nominal damages of $1,000 were awarded. Mr. Justice Hinkson found negligence and a breach of contract but the claim failed on the issue of causation and so no compensatory damages were awarded. An award of damages for breach of contract can be made where no actual damages have been proven.

## IX. RESOURCES

*Lawyers' Professional Liability, Second Edition*, by Grant and Rothstein is an excellent resource on this subject and should be read before taking on any case. Other potential sources to assist in the preparation of a case and in particular the discovery of a defendant lawyer include:

1. Searches of case law that address the subject of the allegation of negligence (i.e., if the lawyer failed to consider a particular head of damage find all of the cases that address that head of damage which existed during the relevant time).
2. The review of relevant practice checklists. There are a number of different sources for checklists including publications from TLABC (seminars, *the Verdict*), CLE (seminars, PLTC material, handbooks), The Law Society (easily found on its website, Professional Conduct Handbook) and the CBA. The Law Society has recently published a book called *Beat the Clock: Timely Lessons from 1600 Lawyers*, which addresses missed limitations and deadlines but is a wealth of tips for avoiding practice mistakes (from which you can craft questions for discovery).
3. Searches of the TLABC, CLE, INSIGHT or any other legal education service to see if the lawyer has either presented at any seminars or written in any publications on the subject or has attended a seminar on the subject (often a list of attendees is available at the front of the seminar material). This is great ammunition to address a lawyer's state of knowledge in a particular area during the relevant time.
4. Searches of cases in which the defendant has acted (i.e., does he or she apparently only act on cases in a different area of practice).
5. Discussions with as many other lawyers practicing in the subject area as are willing to talk to you about their practice.

## X. CONCLUSION

Lawyer's negligence actions can be difficult claims to pursue. Although you may be incensed at a perceived wrong suffered by a potential client at the hands of another lawyer, you would be wise to carefully consider the authorities which address the types of allegations you intend to advance before commencing any action. If you decide to take the case on, retain an expert early and have them assist you in preparing to conduct the discovery. Early in the action, you should also turn your mind to how you are going to prove the underlying case because unexpected evidentiary hurdles can arise in having to conduct the "trial within a trial". In light of the difficulties associated with the prosecution of these claims, you should exercise caution before deciding to take one on.

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