Sacrificial Attorney: Assignment of Legal Malpractice Claims, The

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The Sacrificial Attorney: Assignment of Legal Malpractice Claims

White v. Auto Club Inter-Insurance Exchange

I. INTRODUCTION

The Missouri Court of Appeals for the Western District of Missouri ruled, in a case of first impression, that causes of action for legal malpractice are non-assignable. The court found that permitting assignments would be contrary to public policy because assignments would create a marketplace for legal malpractice claims, jeopardize the attorney’s duties of loyalty and confidentiality to the client, and restrict access to competent legal services. This Note agrees with the court’s result but will explore and challenge the public policy arguments against assignment of legal malpractice claims.

II. FACTS AND HOLDING

On October 18, 1988, Lloyd White and Larry Stephenson ("Stephenson") were involved in a car accident after which Lloyd and Becky White ("White") filed a personal injury suit against Stephenson.\(^2\) Stephenson was insured by Auto Club Inter-Insurance Exchange ("Auto Club"), which arranged for Robert Gould ("Gould") of Gould and Moore\(^3\) to be Stephenson’s counsel.\(^4\) On February 28, 1990, the trial court awarded White a $126,250 judgment against Stephenson.\(^5\)

Following the award, White offered Auto Club a two-part settlement.\(^6\) First, Auto Club was to pay White an amount equal to the limit of Stephenson’s liability insurance, which White correctly understood to be $50,000, plus court costs and statutory interest.\(^7\) Second, White was to be assigned all of

\(^1\) 984 S.W.2d 156 (Mo. Ct. App. 1998).
\(^2\) Id. at 157.
\(^3\) The firm’s name is currently Gould and Thompson, P.C. Id.
\(^4\) Id.
\(^5\) Id.
\(^6\) Id.
\(^7\) Id. The settlement provides: "Auto Club Inter-Insurance Exchange will pay to Mr. and Mrs. White the full extent of its applicable liability insurance coverage for Mr. Stephenson, whatever that amount may be (which [plaintiff’s counsel] understand[s] to be $50,000 plus liability for court costs and statutory interest on the judgment)." Id.
Stephenson’s claims against Auto Club and Gould. Auto Club accepted only the first part of White’s offer.

White and Stephenson then agreed and later executed an assignment of all of Stephenson’s claims against Auto Club and Gould in return for White’s forebearance in enforcing the balance of the judgment against Stephenson and Stephenson’s agreement that White would receive the policy limits of Stephenson’s liability insurance. Auto Club paid White $50,000 on March 19, 1990.

Almost five years after the judgement, White filed suit against Auto Club, Gould, and Gould and Thompson, alleging professional negligence on the part of Gould and conspiracy between Gould and Auto Club “to deprive Stephenson of the opportunity and rights to force Auto Club to pay the entire judgment entered against [Stephenson] because of Auto Club’s bad faith and negligence.”

The trial court granted Auto Club’s and Gould’s motions for summary judgment on White’s legal malpractice and conspiracy claims, finding that the legal malpractice claim was non-assignable. White appealed to the Missouri

8. Id. The settlement provides:
Mr. and Mrs. White will receive an assignment from Mr. Stephenson of Mr. Stephenson’s claim against Automobile Club Inter-Insurance Exchange for breach of its fiduciary responsibilities to Mr. Stephenson, including but not limited to Mr. Stephenson’s claim against Automobile Club Inter-Insurance Exchange for bad faith refusal and failure to settle the claims of Mr. and Mrs. White for the offers of settlement that were made by Mr. and Mrs. White before trial within the policy limits of insurance coverage provided to Mr. Stephenson. Mr. Stephenson would assign to Mr. and Mrs. White all rights and causes of action Mr. Stephenson has against Automobile Club Inter-Insurance Exchange and against you and your law firm, both those arising from breach of contract with Mr. Stephenson and those arising in tort.

Id.

9. Id. The first part of the offer was accepted on March 13, 1990. Id.
10. Id. at 157-58. White and Stephenson made this agreement on March 17, 1990.
11. Id. at 158. The assignment was executed on February 12, 1995.
12. Id.
13. Id.
14. Id. White asserted that Gould was negligent and had a conflict of interest with Auto Club and Stephenson that caused Gould to breach his fiduciary duties to Stephenson.
15. Id. White’s petition also alleged breach of contract against Stephenson for Stephenson’s failure to pay the “policy limits” as contemplated by the March 17, 1990 agreement and Auto Club’s insurance policy. Id. White’s breach of contract ostensibly was based on Auto Club’s payment of only $50,000, which did not include the payment of interest accrued on the judgment.
16. Id. at 156, 158. The trial court awarded White interest on the entire $126,250 judgment for the period up to Auto Club’s $50,000 payment to White and interest on the
III. LEGAL BACKGROUND

A. Law of Assignment in General

At early common law, no cause of action or chose in action was assignable. Relatively early in American jurisprudence, however, courts sitting in equity allowed assignment of choses in action arising out of contract. Progressively, equity courts began to allow the assignment of choses in action arising out of torts to real or personal property.

The test that courts in equity employed to determine whether a chose in action was assignable was whether the cause of action survived to the administrator or executor of the estate. Generally, survivability is determined by reference to the applicable jurisdiction’s survival statute or common law. The survivability-assignability test contains one important exception—a cause of action that survives to the personal representative may still be held non-assignable if contrary to public policy.

$50,000 payment for the period after the payment until the entry of summary judgment.

17. Id. at 158.
18. Id. at 160-61.
20. Id.
21. Id. See also Chouteau v. Boughton, 13 S.W. 877, 878 (Mo. 1890) (allowing assignment of an action for trespass to real property, even though a tort).
22. See Dougherty, supra note 19, at 684. The test for assignability remains the same today, except for substitution of the modern “personal representative” in lieu of “administrator” or “executor.” See Eastern Atl. Transp. & Mechanical Eng’g, Inc. v. Dingman, 727 S.W.2d 418, 423 (Mo. Ct. App. 1987).
24. See Schweiss v. Sisters of Mercy, St. Louis, Inc., 950 S.W.2d 537, 538 (Mo. Ct. App. 1997); Marshall v. Northern Assurance Co. of Am., 854 S.W.2d 608, 610 (Mo. Ct. App. 1993); Dougherty, supra note 19, at 684 (stating that the only causes of action which are non-assignable “are those for torts for personal injuries and for wrongs done to the person, the reputation, or the feelings of an injured party, and those for breach of contract of a purely personal nature, such as promises of marriage”); see also 6 AM. JUR.2d Assignments § 39 (1963) (stating that “[i]n some jurisdictions it is held that a right of action for personal injuries is not assignable” despite a survival statute).
B. Assignability of Legal Malpractice Claims

Assignment of legal malpractice claims is a relatively recent phenomenon (the seminal case was decided in 1976).25 Legal malpractice assignments, like general assignments, raise three issues. First, do legal malpractice claims sound in contract or in tort? Second, however classified, do legal malpractice claims survive? Third, if legal malpractice claims survive, are there countervailing public policy considerations that operate to invalidate the assignment of such claims?

Whether a legal malpractice claim sounds in contract or in tort has been addressed by many courts.26 Courts finding that the cause of action sounds primarily in contract reason that the attorney-client relationship is an express or implied contract to provide legal services.27 When the attorney violates his duty to the client, he breaches the contract. Courts finding that the legal malpractice cause of action sounds in tort reason that the attorney-client relationship is a personal one, and that the attorney’s violation of one of his duties to the client is essentially negligence.28 If a court finds that the cause of action sounds in tort, further analysis is required. The court must ask whether the tort is one of a purely personal nature or is a tort to real or personal property.29 While most courts find the cause of action resembles a tort to real or personal property,30 some courts have found that the cause of action resembles a tort of a purely personal nature.31 Some courts find that the cause of action for legal malpractice

27. See Dougherty, supra note 19, at 684.
28. See Goodley, 133 Cal. Rptr. at 86; Christison, 405 N.E.2d at 9 (stating “[t]he cause of action . . . is, in its essence, a tort action for negligence premised upon breach of the attorney’s duties to his client”).
29. See Hdlund, 539 A.2d at 358-59.
30. Id. at 359.
31. See Dougherty, supra note 19, at 684 (stating that the legal malpractice claim is non-assignable “because of the personal relationship which exists between an attorney and his client . . . [which] likened the action for legal malpractice to actions for torts involving personal injuries or wrongs done to the person”).
sounds in both contract and tort. When a court finds the claim sounds in both contract and tort, the court looks to public policy to resolve the issue.

Whether a legal malpractice claim survives to a client’s personal representative is the next step in determining assignability. As previously stated, if it survives it is assignable. The survivability of a cause of action requires reference to the jurisdiction’s survival statutes and common law. Causes of action arising out of contract generally survive and are assignable. Causes of action arising out of tort to real or personal property generally survive and are assignable. Causes of action arising out of purely personal torts, at common law, generally did not survive and were not assignable. This generalization regarding the survival of causes of action arising out of torts of a purely personal nature is now inappropriate. Some states have statutes specifically allowing survival to the personal representative. Nevertheless, despite survivability, legal malpractice claims are generally non-assignable. The basis for finding a survivable cause of action non-assignable is public policy.

Whether an assignment of a legal malpractice claim violates public policy is the decisive issue in whether courts invalidate or permit assignments. As such, this Note will first address the public policy arguments made by the jurisdictions that prohibit assignments and then will address the arguments made by the jurisdictions that permit assignment of legal malpractice claims.

Because a majority of courts addressing the issue have held such claims non-assignable, this Note has organized the non-assignability public policy arguments and presented them in a uniform format. The public policy arguments against assignment are that assignments would: (1) undermine the attorney-client relationship, (2) demean the legal profession, and (3) create a risk of collusion.

33. See Picadilly, 582 N.E.2d at 341.
34. See Dougherty, supra note 19, at 648.
35. See Dougherty, supra note 19, at 648.
36. See Dougherty, supra note 19, at 648.
37. See Dougherty, supra note 19, at 648.
39. Id.
40. See Dougherty, supra note 19, at 684.
 Courts prohibiting assignment of legal malpractice claims argue that assignments would undermine the attorney-client relationship in two basic ways. First, assignments would jeopardize the attorney’s duty of loyalty by creating conflicts of interest between the attorney and the client. Second, assignments would eliminate the attorney’s duty of confidentiality by creating circumstances where the client’s control over the attorney’s disclosure of confidential information would be lost; at the very least, the possibility of an assignment would inhibit transfer of information between the attorney and the client.

Courts argue that assignment of legal malpractice claims would jeopardize the attorney’s duty of loyalty by creating a conflict of interest between the attorney and the client. The classic occurrence of this conflict of interest would arise in settlement negotiations. An adversary unable to collect a judgment may agree to a settlement in exchange for an assignment of any legal malpractice claims the opposing party may have against her attorney. The adversary would then seek to obtain and collect a judgment against the presumably more wealthy attorney. Thus, the attorney is faced with a dilemma. The attorney’s duty of loyalty runs only to the client. However, in accepting the favorable offer to the client, the attorney is making himself a target for future litigation. Simply put, the client’s interest in accepting a favorable settlement offer, likely extinguishing his liability, is contrary to the attorney’s interest in avoiding a lawsuit. Thus, courts reason that such an assignment would jeopardize an attorney’s duty of loyalty.

Courts also find that permitting assignments would jeopardize the duty of loyalty by tempering an attorney’s duty of zealous advocacy. Zealous advocacy may force an adversary into offers of settlement (with attendant offers of assignment), while less than zealous advocacy may sacrifice a defendant’s interest by subjecting him or her to judgment. The adversary’s ability to negotiate a post-judgment assignment is irrelevant at this juncture. The attorney

44. See supra note 42 and accompanying text.
45. See Zuniga, 878 S.W.2d at 317.
46. Id.
47. Id.
48. See Picadilly, Inc. v. Raikos, 582 N.E.2d 338, 342 (Ind. 1991) (stating that “[i]f an attorney is providing zealous representation to a client, the client’s adversary will likely be motivated to strike back’ and make an offer of assignment to the client); Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 317 (Tex. App. 1994).
is faced with a risk (real or perceived) of personal liability for forcefully asserting her client’s position. An attorney may sacrifice the client to a default judgment rather than zealously advocating the client’s position.49 The client may not have the resources to pursue a client-driven action for legal malpractice, while the adversary might be in a better financial position to pursue such an action.50 The easy answer is for the attorney not to accept a disadvantaged client, but this action also implicates further public policy concerns.

Courts reason that assignments would also destroy the confidential relationship between attorney and client because an attorney’s defense of legal malpractice claims necessarily involves disclosure of a client’s confidential information.51 In client-driven legal malpractice actions, a client can prevent disclosure of confidential information simply by dropping suit.52 When a client assigns a claim for legal malpractice, however, the client has no further rights in the action.53 As such, the client has no right to force the withdrawal of the assignee’s legal malpractice suit to prevent disclosure of confidential information. Furthermore, the potential for assignment may cause a client to restrict an attorney’s access to valuable information in a pre-emptive effort to prevent future disclosure should an assignment become advantageous.54 These scenarios, courts reason, would violate the sanctity of the confidential relationship between attorney and client.

Courts prohibiting legal malpractice claims also argue that assignments would demean the legal profession in three fundamental ways. First, assignments would create a marketplace for legal malpractice claims that is inherently detrimental to the legal profession.55 Second, assignments would require attorneys to advocate patently contradictory positions in successive proceedings, which would reinforce negative public perception of the legal profession.56 Third, assignments would restrict the disadvantaged client’s access

50. See generally Aleman, 925 F. Supp. at 252.
52. See Picadilly, 582 N.E.2d at 343.
53. See 4 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 856 (1951) (stating “[p]rior to notice to the obligor, the assignor still has the power to discharge; and none after such notice”).
55. See Goodley, 133 Cal. Rptr. at 87.
to competent legal services, disenfranchising those whom the profession purports to protect.\textsuperscript{57}

Courts prohibiting assignments argue that the potential creation of an economic market for legal malpractice claims is inherently detrimental to the legal profession.\textsuperscript{58} In \textit{Zuniga v. Groce, Locke & Hebdon}, the court echoed a common theme: "We do not relish the thought of entrepreneurs purchasing the legal rights of clients against their attorneys as an ordinary business transaction in pursuit of profit."\textsuperscript{59} The leading case prohibiting assignments of legal malpractice claims, \textit{Goodley v. Wank & Wank}, voiced similar concerns, stating that "[t]he commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession."\textsuperscript{60}

Courts prohibiting assignment of legal malpractice claims also argue that the "role reversal" required in the subsequent malpractice action reinforces negative public perception of the legal profession.\textsuperscript{61} This "role reversal" is the requirement that the attorney take contradictory positions in successive suits.\textsuperscript{62} In \textit{Alcman Services Corp. v. Bullock}, an essentially judgment-proof defendant suffered a seven million dollar default judgment to the plaintiff.\textsuperscript{63} The defendant then assigned any potential legal malpractice claim against his attorney to the plaintiff.\textsuperscript{64} The plaintiff-assignee then sued the attorney for legal malpractice.\textsuperscript{65} The positions of the litigants and the tenor of the court is indicated in the following passage:

In obtaining its $7 million default judgment . . . [plaintiff] filed an affidavit swearing that [defendant] rightfully owed [plaintiff] the full $7 million. [Plaintiff-assignee] now seeks to come before this court and argue, in essence, that [defendant] did not actually owe the full $7 million but, rather, that some portion of that $7 million was the result of [the attorney's] malpractice.\textsuperscript{66}

\begin{itemize}
  \item \textsuperscript{57} \textit{See Goodley}, 133 Cal. Rptr. at 87; \textit{Zuniga}, 878 S.W.2d at 317-18.
  \item \textsuperscript{58} \textit{See Goodley v. Wank & Wank}, 133 Cal. Rptr. 83, 87 (Ct. App. 1976).
  \item \textsuperscript{59} \textit{Zuniga}, 878 S.W.2d at 316.
  \item \textsuperscript{60} \textit{Goodley}, 133 Cal. Rptr. at 87.
  \item \textsuperscript{61} \textit{See Alcman Servs. Corp. v. Bullock}, 925 F. Supp. 252, 256-58 (D.N.J. 1996);
  \item \textsuperscript{62} \textit{Zuniga}, 878 S.W.2d at 317-18.
  \item \textsuperscript{63} \textit{Alcman}, 925 F. Supp. at 255.
  \item \textsuperscript{64} \textit{Id.}
  \item \textsuperscript{65} \textit{Id.}
  \item \textsuperscript{66} \textit{Id.} at 256. The court in \textit{Alcman} approached this argument in a unique manner, using the doctrine of judicial estoppel to prevent the plaintiff assignee from arguing "such fundamentally contradictory positions." \textit{Id.}
\end{itemize}
The court in Zuniga v. Groce, Locke & Hebdon\(^6\) stated that "[f]or the law to
countenance this abrupt and shameless shift of positions would give prominence
(and substance) to the image that lawyers will take any position depending on
where the money lies, and that litigation is a mere game and not a search for the
truth."\(^6\)

Courts prohibiting assignment agree that the restriction of legal services to
all but clients with sufficient assets is also contrary to public policy.\(^6\) The court
in Zuniga v. Groce, Locke & Hebdon identified the potential restriction: "[T]o
allow assignment would make lawyers reluctant—and perhaps unwilling—to
represent defendants with inadequate insurance and assets."\(^7\) The court in
Goodley v. Wank & Wank stated that assignments "would most surely result in
a selective process for carefully choosing clients thereby rendering a disservice
to the public and the profession."\(^7\)

Courts prohibiting assignment of legal malpractice claims also identify the
risk of collusion as contrary to public policy.\(^7\) In Coffey v. Jefferson County
Board of Education,\(^7\) the defendant appeared in court with the plaintiff,
confessed to a one million dollar judgment, and immediately attempted to assign
his legal malpractice claim against his attorney to the plaintiff.\(^7\) The court
refused to allow the assignment because of the appearance of collusion.\(^7\)

Only three jurisdictions clearly permit the assignment of legal malpractice
claims. Because of the limited number of such opinions and the important
factual background of each, this Note will present the cases permitting
assignments individually.

In Hedlund Manufacturing Co. v. Weiser, Stapler & Spivak,\(^7\) the plaintiff-
assignees purchased the client's business, which included a pending patent
application.\(^7\) The U.S. Patent Office rejected the application because the
client's attorney failed to properly file the application.\(^7\) The client then assigned

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68. Id. at 318.
App. 1976); Zuniga, 878 S.W.2d at 317-18.
70. Zuniga, 878 S.W.2d at 317.
71. Goodley, 133 Cal. Rptr. at 87.
Coffey v. Jefferson County Bd. of Educ., 756 S.W.2d 155, 157 (Ky. Ct. App. 1988);
73. 756 S.W.2d 155 (Ky. Ct. App. 1988).
74. Id. at 156.
75. Id. at 157 (stating that "it appears to us that this transaction is so collusive that
same should be held to be against public policy").
77. Id. at 358.
78. Id.
his legal malpractice claim to the plaintiff. The Pennsylvania Supreme Court reversed the trial court's grant of summary judgment in favor of the attorney and found that legal malpractice claims are assignable. The court found that the legal malpractice claim sounded both in tort and breach of contract and concerned "purely pecuniary interests." The court rejected the public policy arguments forwarded by other jurisdictions and stated: "[w]e will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected."

In Ammon v. McCloskey, the plaintiff was a passenger in the client's car, which was involved in an accident with a third party. The plaintiff was awarded a judgment against the client and subsequently released the client from further liability in exchange for an assignment of the client's legal malpractice claim against the attorney. The Pennsylvania appellate court permitted the assignment, following state precedent in Hedlund.

In Thurston v. Continental Casualty Co., the defendant-client suffered a judgment that it was unable to pay following a products liability lawsuit. The defendant-client assigned its legal malpractice claim to the plaintiff, who then brought suit against the defendant's attorney. The Maine Supreme Court summarily rejected the public policy arguments forwarded by those courts that prohibit assignment of legal malpractice claims. The court stated:

79. Id.
80. Id. at 359.
81. Id. (stating that "a claim for damages based upon legal malpractice does not involve personal injury in that it arises out of negligence and breach of contract, and the injury alleged concerns purely pecuniary interests. The rights involved are more akin to property rights which can be assigned prior to liquidation.").
82. Id.
84. Id. at 550.
85. Id. at 550-51.
86. Id. at 551.
88. Id. at 923.
89. There is inconsistency in the interpretation of Thurston concerning whether the assignee was the plaintiff in the underlying products liability lawsuit or a shareholder of the corporation. In Wagener v. McDonald, 509 N.W.2d 188, 192 (Minn. Ct. App. 1993), the court determined the assignee was a shareholder; in Ammon, 655 A.2d at 552, the court determined the assignee was the plaintiff in the underlying suit. The Thurston opinion reads: "[the defendant's] stockholders, in order to settle some claims by the products liability plaintiff against them, agreed to have [defendant] assign to her all [defendant's] rights against its lawyers."
90. Thurston, 567 A.2d at 923.
91. Id.
[T]he argument that legal services are personal and involve confidential attorney-client relationships does not justify preventing a client... from realizing the value of its malpractice claim in what may be the most efficient way possible, namely, its assignment to someone else with a clear interest in the claim who also has the time, energy and resources to bring the suit.92

In Oppel v. Empire Mutual Insurance Co.,93 a truck driven by the defendant struck the plaintiff's infant son.94 The plaintiff offered to settle the case for $10,000, the limits of the defendant's liability insurance.95 The defendant made a counter-offer, which was rejected.96 The plaintiff recovered a judgment against the defendant for $421,850.25.97 Subsequently, the defendant-client assigned his claims against his insurance carrier and attorney.98 The Southern District Court of New York determined that the legal malpractice claim was assignable because it sounded both in contract and in tort not involving personal injury.99

Other jurisdictions have allowed assignment of legal malpractice claims, but the factual posture of these cases indicates that the extent of assignment may be limited.100 However, these courts have not subsequently addressed the assignment of legal malpractice claims so that the results of future cases remain uncertain.101

92. Id.
94. Id. at 1306.
95. Id.
96. Id. The counteroffer was approximately $9,500.
97. Id.
98. Id.
99. Id. at 1307. In Oppel, the court stated: "[T]here is no allegation that the attorney's acts caused any personal injury, only pecuniary. This claim is... assignable." Id.
100. See Richter v. Analex Corp., 940 F. Supp. 353 (D.D.C. 1996) (assignee was purchaser-successor in interest of assignor's corporation); Collins v. Fitzwater, 560 P.2d 1074 (Or. 1977) (assignees were purchasers of unregistered securities issued by corporation of which defendant-assignor was director).
101. Courts have also had to decide whether assignments of legal malpractice claims by operation of law are valid. The usual question is whether a bankruptcy trustee receives an assignment of the debtor's potential legal malpractice claims. The results of these cases are inconsistent. Compare Scarlett v. Barnes, 121 B.R. 578 (Bankr. W.D. Mo. 1990) (legal malpractice claims are non-assignable and thus are exempt from the bankruptcy estate) with Hoth v. Stogsdill, 569 N.E.2d 34, 39 (Ill. App. Ct. 1991) (questioning whether legal malpractice claims are exempt from the bankruptcy estate based on the Bankruptcy Reform Act of 1978). See also FDIC v. Martin, 770 F. Supp. 623 (M.D. Fla. 1991), in which the court held that the FDIC as receiver of the bank-client received an assignment of the bank's legal malpractice claims against its attorneys. The decision preempted contrary state law.
IV. INSTANT DECISION

In *White v. Auto-Club Inter-Insurance Exchange*, the Missouri Court of Appeals for the Western District of Missouri first recognized that assignments for purely personal torts are prohibited in Missouri.[102] The court then determined that although legal malpractice claims involve economic damages, the attorney-client relationship, being highly personal, compels a finding that legal malpractice is a tort claim.[103] Because of this personal relationship and the economic aspects of legal malpractice, the tort cannot be classified as a purely personal tort or a tort to real or personal property.[104]

The court cited *Goodley v. Wank & Wank* and agreed with the policy arguments against assignment of legal malpractice claims. The court agreed that allowing assignment of legal malpractice claims would create a marketplace for legal malpractice claims, jeopardize the duty of loyalty and confidentiality, and restrict access to competent legal services.[105] Accordingly, the court held that because legal malpractice claims are non-assignable on public policy grounds, the circuit court did not err in granting summary judgment in favor of Gould.[106]

V. COMMENT

A majority of courts addressing the assignability of legal malpractice claims have held such assignments invalid on public policy grounds.[107] However, these courts have not examined in-depth the policy arguments against assignments. Although some of the arguments are persuasive, some lack merit. This Note will explore the viability of these public policy arguments against assignability of legal malpractice claims.

Before reaching considerations of public policy, resolution of whether a legal malpractice claim sounds in contract or in tort and whether the claim survives is necessary. An attorney’s failure to use the requisite skill and knowledge in the client’s representation looks like negligence. Indeed, the Model Rules of Professional Conduct speak exclusively in terms of duty.[108]

103. Id.
104. Id.
105. Id. at 160.
106. Id.
107. See supra note 41 and accompanying text.
108. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1998) (stating that “[a] lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”); Rule 1.3 (stating “[a] lawyer shall act with reasonable diligence and promptness in representing a client”); Rule 1.7(2) (stating “[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s
Thus, a majority of courts agree that a legal malpractice claim sounds in tort.\textsuperscript{109} A legal malpractice claim is also most analogous to a tort to personal property. Although the attorney-client relationship is a personal one, the damage sustained is pecuniary, like damages in a tort to personal property. Because a cause of action for a tort to personal property survives,\textsuperscript{110} legal malpractice claims are assignable unless contrary to public policy.\textsuperscript{111}

Some courts prohibiting assignment argue that such assignments would undermine the attorney-client relationship by jeopardizing the attorney's duty of loyalty.\textsuperscript{112} The potential for assignment would readily create a conflict of interest between the attorney and the client. The client's interest in accepting a favorable settlement offer that includes an assignment is contrary to the attorney's interest in avoiding personal liability. In assignments to adversaries, this conflict of interest is inescapable. The \textit{Model Rules of Professional Conduct} require the attorney to avoid all conflicts of interest.\textsuperscript{113} The real possibility of assignment to an adversary is a persuasive public policy argument against allowing such assignments.

Courts prohibiting assignment also maintain that assignments would undermine an attorney's duty of loyalty by tempering the attorney's duty of zealous advocacy. Implication of the duty of zealous advocacy via the duty of loyalty stands on different footing than the potential conflict of interest and is ultimately unpersuasive. Less than zealous advocacy will only make the realization of a malpractice claim possible. If assignments were permitted, the attorney's best defense against liability would be to provide zealous advocacy. While it is true that the attorney would have to defend a frivolous lawsuit, this concern involves the prohibition of assignments generally, not the duty of zealous advocacy. The attorney's duty of zealous advocacy would only be reinforced if assignments were permitted; this public policy argument against assignments is meritless.

The argument that assignments would undermine the attorney's duty of confidentiality is similarly unpersuasive. In client-driven suits, the client can


\textsuperscript{110} See \textit{Dougherty}, \textit{supra} note 19, at 684.

\textsuperscript{111} See \textit{Dougherty}, \textit{supra} note 19, at 684.

\textsuperscript{112} See \textit{supra} note 42, 43 and accompanying text.

\textsuperscript{113} See \textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 1.7(b) (1998) (stating "[a] lawyer shall not represent a client if the representation of that client may be materially limited by ... the lawyer's own interests").
prevent disclosure by dropping the suit. In assignments, the client does not have this escape hatch. Nevertheless, when the client decides to assign his legal malpractice claim, he should be aware of the consequences. In fact, the attorney likely would be negligent in failing to inform the client of the ramifications of such an action. When a client assigns her legal malpractice claim, she is consenting to disclosure of confidential information. The client can avoid disclosure by not assigning the claim. The decision is still in the client’s control, but the decision must be made at an earlier juncture than in a client-driven suit. The duty of confidentiality is destroyed by the client, not the assignment. The potential breach of the duty of confidentiality is not a valid argument against assignments.

Courts prohibiting assignments also argue that the practice would demean the legal profession by: (1) creating a distasteful market for legal malpractice claims, 114 (2) reinforcing negative public perception of the profession, 115 and (3) restricting the availability of competent legal services. 116

The argument that the creation of a marketplace for legal malpractice claims would demean the profession is, in reality, merely a subset of the profession’s latent antagonism toward legal advertising in general. 117 If advertisements for legal services were forbidden, public awareness of the ability to assign legal malpractice claims would be limited. Without public awareness, assignments could only demean the profession from within. Yet, a marketplace for legal malpractice claims would not demean the profession from within; attorneys now sue other attorneys for legal malpractice with increasing frequency. 118 Moreover, it could be argued that assignments would improve public perception of the profession by rebutting the sentiment that attorneys “stick together.” Potential marketability is not a valid public policy argument against assignments.

The “role reversal” required of attorneys is, however, demeaning to the legal profession both from the public’s perspective and from within. While perpetuation of legal fiction is sometimes necessary to maintain stability in the law, this is not one of those instances. It is worth repeating the statement of the court in Zuniga: “[f]or the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers will take any position depending on where the money lies, and that litigation is

117. See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 cmt. 3 (1998) (stating that “[s]ome jurisdictions have had extensive prohibitions against television advertising . . . or against ‘undignified advertising’”).
a mere game and not a search for the truth."  

That attorneys can advocate both sides of an issue in normal situations is a necessity in the legal system. Indeed, even this ability is one source of public mistrust in the legal profession. Allowing attorneys to advocate both sides of the same issue in successive lawsuits would justify negative public perception.

This "role reversal" would also demean the profession from within. The legal system operates to vindicate an injured party's legal rights; compensation for the vindication is consequential. If assignments were permitted, the assignee's attorney would be arguing the adversary's position solely for the purpose of collection and would be placing compensation before vindication of legal rights. Attorneys are not, or should not be, automatons for their client's objectives. Attorneys are officers of the court with all of the attendant responsibilities thereof. This "role reversal" would involve introspection that a conscientious attorney would not wish to bear, but that would be required to pursue the client's interest.

Assignments would damage the profession's public reputation and require attorneys to advocate positions unrelated to the vindication of their clients' legal rights. Therefore, "role reversal" is a compelling public policy argument against assignments.

Assignments also inappropriately restrict the access "persons of limited means" have to competent legal services. The Model Rules of Professional Conduct state that the rules encouraging pro bono service "recognize [that a] critical need for legal services exists among persons of limited means." The Model Rules further state that "[e]very lawyer . . . has a responsibility to provide legal services to those unable to pay, and personal involvement can be one of the most rewarding experiences in the life of a lawyer." Doubtless any attorney would not find the experience very rewarding when his pro bono client assigns a legal malpractice claim in exchange for a release of liability. The attorney might seek to avoid this situation by refusing to represent "persons of limited means," which would affront the policy in favor of assisting indigents through the provision of free legal services.

Creation of the risk of collusion is also a compelling public policy argument against assignments. The bargain-exchange, extinguishing one's liability and creating liability in another, likely innocent party, should not be condoned. That an attorney would be omitted from the adversary's initial query about the

119. Zuniga, 878 S.W.2d at 318.
120. See generally Model Rules of Professional Conduct Rule 1.2 cmt. 1 (stating that "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so").
121. See generally Model Rules of Professional Conduct Preamble (stating that "[a] lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice").
possibility of an assignment is a given. The adversarial system and the goals of justice would be diminished. It could be argued that common settlements operate to diminish the adversarial system. This may be true to a certain extent, but common settlements do not operate at the expense of parties unable to negotiate their position. Assignments would engender collusion. The law should not enable that which it seeks to prohibit.

It is noteworthy that courts permitting assignments have allowed assignment only when the assignee was an adversary or was in some other way involved in the underlying dispute.\(^{124}\) These courts reason that assignees should be able to realize their claims by whatever legal means available.\(^{125}\) This policy favoring assignments is wholly unsatisfying in relation to the public policy arguments against assignment.

The persuasive public policies against assignments all involve assignments to the adversary in the underlying lawsuit. Each of the policies against assignment, standing alone, rebuts the "collection by whatever means" argument favoring assignment. Nevertheless, the question remains whether the client should be allowed to assign her claim to an unrelated third party. Although the policy arguments against assignment to unrelated third parties (creation of a market for legal malpractice claims) are unpersuasive, prohibiting assignment to one class and allowing assignment to another would raise problems in application. Creative solutions to such a division abound; asking the courts to divine the real party leads to the conclusion that a per se prohibition of assignments is sound.

VI. CONCLUSION

The Missouri Court of Appeal for the Western District of Missouri correctly decided that assignment of legal malpractice claims should be prohibited. Unfortunately, however, the public policy arguments were not fully developed. While the most compelling public policy arguments prohibiting assignments involve only assignments to adversaries, a per se rule against assignments is required for stability of the law and consistency in application.

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\(^{125}\) See Thurston, 567 A.2d at 923.

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