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Torts: Missing the Forest for the Factors—Frederick v. Wallerich, 907 N.W.2D 167 (Minn. 2018)

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TORTS: MISSING THE FOREST FOR THE FACTORS—
FREDERICK V. WALLERICH, 907 N.W.2D 167 (MINN. 2018)

Michelle Gibbons†

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In *Frederick v. Wallerich*, the Minnesota Supreme Court held that an attorney’s later failure to identify an earlier error, leading to a loss of an opportunity to mitigate damages caused by the initial error, could constitute a separate instance of legal malpractice triggering its own limitations period.\(^1\) In *Wallerich*, the court declined to dismiss an action based on damages incurred in a divorce proceeding. The damages were principally caused by a negligently drafted antenuptial agreement which was later incorporated into a separate legal document (a will).\(^2\) Instead of following Minnesota’s bright-line rule (that damages flowing from a negligently drafted antenuptial agreement accrue on the date of the marriage), the court allowed the plaintiff to allege that the later negligent act—the attorney’s failure to verify the validity of the antenuptial agreement—caused additional damages, thus constituting a wholly separate claim.\(^3\) In doing so, the court introduced a multi-factor framework, including factors that helped the court isolate the two claims.\(^4\)

This case note argues that the multi-factor framework complicates, rather than clarifies the law. Further, this case note recommends that the analysis should focus on whether the plaintiff has sufficiently alleged a separate breach and separate cause of damages. If the plaintiff can state a claim separate from a claim that is barred by a statute of limitations, then his or her claim should survive

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1. 907 N.W.2d 167, 180 (Minn. 2018).
2. *Id.*
3. *Id.* at 179.
4. *Id.* at 176.
a motion to dismiss. This note also highlights key features of the holding that may increase transactional attorneys' overall exposure to malpractice claims. Additionally, the analysis explores a “separate duty” or “scope of representation” approach and the probable effect of a “Frederick Letter” disclaiming particular tasks. Finally, this note offers guidance for transactional attorneys seeking to avoid malpractice lawsuits.

II. HISTORY

A. Negligence and Legal Malpractice: The Elements

To assert a claim for negligence, the plaintiff generally must show that the defendant acted negligently and that the defendant's negligence caused the plaintiff harm.5 When a professional, such as an attorney, doctor, or architect, performs a service negligently, resulting in harm to their client, the professional commits malpractice.6 Under Minnesota law, attorneys are liable for legal malpractice when they perform legal services below the level of skill or diligence of a reasonable attorney.7 To assert a claim for legal malpractice, the plaintiff must allege: (1) the existence of an attorney-client relationship, (2) negligence by the attorney,8 (3) that the negligence was the proximate cause of the client's damages, and (4) that but for the attorney's negligence, the client would have obtained a more favorable outcome in the litigation or transaction than the outcome actually obtained.9

5. DAN B. DOBIS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 124 Elements of the Prima Facie Case for Negligence (2d ed. 2018) [hereinafter Dobis].
8. A plaintiff may also allege breach of contract. See, e.g., Ronnigen v. Hertogs, 294 Minn. 7, 199 N.W.2d 420 (1972); Christy, 288 Minn. 144, 179 N.W.2d 288. But the analysis is similar to a claim for negligence. Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 693 (Minn. 1980).
9. Frederick, 907 N.W.2d at 173 (citing Jerry's Enters., 711 N.W.2d at 819 (holding that while the fourth element normally turns on whether the plaintiff would have been successful in the prosecution or defense of a legal action, this element must be altered in a transactional context)).
1. Duty: The Attorney-Client Relationship

The distinguishing factor between legal malpractice and a typical negligence claim is the first element: the attorney-client relationship. In tort law, all people, regardless of their relationship, owe a duty of reasonable care to avoid causing physical or emotional harm to another.¹⁰ The damage in legal malpractice, however, is typically economic loss, rather than physical or emotional harm.¹¹ When the damage alleged is economic loss, most states require a “special relationship” between the parties whereby the plaintiff relied on the defendant, and the defendant was responsible for some economic outcome for the plaintiff.¹² This special relationship triggers a duty owed by the defendant to the plaintiff that the defendant would not otherwise owe.¹³ The attorney-client relationship is one of these relationships.¹⁴ Thus, an attorney’s duty to his or her client arises out of this special relationship, and without such a relationship, the attorney may not be held liable.

Most attorney-client relationships are formed through express written agreements called “retainer agreements” or “engagement letters.”¹⁵ These letters typically state the following: (1) that an attorney-client relationship exists; (2) who the parties are; (3) what each party has agreed to do; and (4) the scope of those duties.¹⁶ The existence and widespread use of engagement letters does not imply,
however, that if there is no letter, there is no relationship.\textsuperscript{17} To the contrary, an attorney-client relationship may also be implied.\textsuperscript{18}

\begin{itemize}
\item \textbf{Toogstad}

\textit{Toogstad v. Vesely}, a landmark Minnesota Supreme Court decision that focused on the "duty" element of legal malpractice, still defines the attorney-client relationship in Minnesota today.\textsuperscript{19} In \textit{Toogstad}, the plaintiff’s husband was rendered mute and partially paralyzed after being treated by a doctor for an aneurysm.\textsuperscript{20} The plaintiff met with an attorney to see if she had a case against the doctor for medical malpractice.\textsuperscript{21} The attorney told Ms. Togstad that "he did not think [the Togstads] had a legal case, however, he was going to discuss this with his partner."\textsuperscript{22} Ms. Togstad did not sign an agreement or pay a fee for the consultation.\textsuperscript{23} When Ms. Togstad never heard back from the attorney, she assumed she did not have a case.\textsuperscript{24} As a result, by the time Ms. Togstad sought a second opinion from another lawyer, she had missed the opportunity to bring the claim because the statute of limitations had run.\textsuperscript{25}

The Minnesota Supreme Court held that Ms. Togstad and the attorney had formed an attorney-client relationship during the consultation because she sought, and the attorney gave, legal advice.\textsuperscript{26} According to the court, this was true regardless of any written agreement, fee, or perhaps most importantly, whether the attorney considered Ms. Togstad to be his client.\textsuperscript{27}
\end{itemize}

\begin{itemize}
\item \textsuperscript{17} \textit{See Togstad v. Vesely, 291 N.W.2d 686, 693 (Minn. 1980); Ryan v. Long, 35 Minn. 394, 394, 29 N.W. 51, 51 (1886).}
\item \textsuperscript{18} \textit{Downs, supra note 5, § 719; see also Togstad, 291 N.W.2d at 693; Ryan, 35 Minn. at 394, 29 N.W. at 51.}
\item \textsuperscript{19} \textit{See Togstad, 291 N.W.2d at 693–94.}
\item \textsuperscript{20} \textit{Id. at 689.}
\item \textsuperscript{21} \textit{Id. at 690.}
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id. at 693.}
\item \textsuperscript{27} \textit{Id.}
\end{itemize}
b. The Non-Engagement Letter

Togstad was a controversial case. The decision was met with apprehension from members of the legal community, who viewed its implications as burdensome and difficult to navigate.\(^\text{28}\) One commentator worried about being held liable for “curbstone opinions,”\(^\text{29}\) or “casual and offhand opinion[s] on a point of law [made] to a friend whom he meets on the street.”\(^\text{30}\) Another commentator characterized the expanded liability as an “ax hanging over [attorneys’] heads,” which would prevent attorneys from serving the public prudently and would raise the cost of legal services overall.\(^\text{31}\) Yet another characterized the court’s ruling as prohibiting attorneys from ever rejecting a case on its merits unless the attorney takes the time to carefully consider the facts and research the relevant law.\(^\text{32}\)

An attorney may decide against taking on a client for reasons other than the merits of the client’s case, such as not practicing in the relevant area of law, having a big workload, an ethical conflict of interest associated with representing the client, or simply not wanting to be involved.\(^\text{33}\) In these situations, no careful consideration or legal research is required, as long as the attorney does not render any legal advice to the nonclient.\(^\text{34}\) But if a visitor to a law office is sent home and misinterprets the reason why he is not a client, the attorney who


\(^{29}\) Id.

\(^{30}\) RESTATEMENT (SECOND) OF TORTS § 552 cmt. d (AM. LAW INST. 1977) (alteration in original).

\(^{31}\) Hoover, supra note 28 (footnote omitted).

\(^{32}\) See id. (footnote omitted). In Togstad, this would have included, at a minimum, obtaining medical records and consulting experts in the medical field. See Togstad v. Vesely, 291 N.W.2d 686, 691–92 (Minn. 1980).

\(^{33}\) See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (AM. LAW INST. 2000) (exceptions include court appointment for indigent criminal defendants, representation that would violate ethical rules such as assisting a client with illegal activity, and refusal to represent a client for discriminatory reasons).

\(^{34}\) See Togstad, 291 N.W.2d at 693.
interviewed him may be liable for resulting damages.\textsuperscript{35} Any discrepancy is likely to be resolved in the client’s favor.\textsuperscript{36} 

\textit{Togstad} made it clear that the best practice for attorneys is to leave nothing to interpretation when it comes to who is, and who is not, a client.\textsuperscript{37} Furthermore, this distinction should be in writing, in the form of a letter, in case the issue ever comes before the court.\textsuperscript{38} To cover all bases, the communication should also suggest that the non-client seek another attorney and that the statute of limitations may bar their claim if they wait too long.\textsuperscript{39} Letters of this nature are called “non-engagement letters,” often colloquially referred to as “Togstad Letters.”\textsuperscript{40} Togstad Letters are currently widely used by many law

\textsuperscript{35} Id.  
\textsuperscript{36} Attorney-Client Agreements Toolkit, supra note 16, at 10; Cf. Restatement (Third) of the Law Governing Lawyers, supra note 33, § 18(2) (Am. Law Inst. 2000) (“A tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it.”); Id. § 31 cmt. h (“[T]he client’s reasonable understanding of the scope of the representation controls.”).  
\textsuperscript{38} Attorney-Client Agreements Toolkit, supra note 16, at 10–11; Hoover, supra note 28.  
\textsuperscript{39} See Attorney-Client Agreements Toolkit, supra note 16, at 10 (“Without written evidence of non-representation, courts typically rule in favor of the prospective client . . . .”).  
\textsuperscript{40} See, e.g., Aaron Hall, Lawyer Non-Engagement Togstad Letter Template: Declining Representation, Attorney Aaron Hall, https://aaronhall.com/lawyer-non-engagement-togstad-letter-template-declining-representation/ [https://perma.cc/89DP-NMEU]; Legal Notice. Under state law, we are required to tell you that there are statutes of limitation and legal deadlines for your situation. Failure to act within these times can result in a waiver of your rights. We have made no representations to you regarding these deadlines. Accordingly, you should seek legal advice as soon as possible should you wish to pursue this matter further.  
\textit{Id.}
firms, and are strongly recommended by legal insurance providers and the American Bar Association. These letters serve to prevent misunderstandings and protect attorneys from costly lawsuits.

2. Getting to the Jury

Whether an attorney-client relationship exists is a question of duty—where there is no "client-lawyer relationship, there is rarely a duty, and without a duty, there can be no malpractice liability." The question of whether the attorney owed the client a duty is generally a question of law for the court. This means that, save for cases where the court asks a jury to examine duty at trial, failure to prove this element may result in dismissal at the earliest possible stage—the pleading stage—foreclosing trial, and therefore, recovery.

Additionally, while a plaintiff need not prove the other elements of their cause of action, the plaintiff still must allege sufficient facts to support those elements. The state of Minnesota generally observes a liberal pleading standard whereby a plaintiff may allege minimal facts at the outset of the lawsuit. Dismissal because the plaintiff failed to state a claim is only granted to the defendant if, taking the

41. See id. ("A standard practice for law firms and attorneys in Minnesota is sending a Non-Engagement Letter (i.e. Togstad Letter) to everyone who contacts the firm or lawyer but does not hire the firm or lawyer.").
42. ATTORNEY-CLIENT AGREEMENTS TOOLKIT, supra note 16, at 10–11 (stating the non-engagement letter "should be a principle part of the client-intake process[]" because of the potential for a malpractice liability claim).
43. See A.B.A., supra note 37.
44. ATTORNEY-CLIENT AGREEMENTS TOOLKIT, supra note 16, at 10–11.
45. Dobbs, supra note 5, § 719.
46. Id.
47. See id. (noting that some courts task juries with resolving factual disputes on whether a duty exists).
48. See Minn. R. Civ. P. 12.03; see also Minn. R. Civ. P. 56.
49. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007). ("The factual allegations must be minimally sufficient to show a plausible entitlement to relief so that the defendant will have "fair notice of what the . . . claim is and the grounds upon which it rests . . . ."") (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
50. See, e.g., Walsh v. U.S. Bank, 851 N.W.2d 598, 604–05 (Minn. 2014) (interpreting Minn. R. Civ. P. 8.01, 8.05); First Nat’l Bank of Henning v. Olson, 246 Minn. 28, 28–29, 74 N.W.2d 123, 124 (1955) (interpreting Minn. R. Civ. P. § 8.01).
51. Noske v. Friedberg, 670 N.W.2d 740, 742–43 (Minn. 2003); Minn. R. Civ. P. 12.02.
facts alleged in the complaint as true, a court could not possibly grant the plaintiff the relief sought.\footnote{52}

\section*{B. Statutes of Limitation}

\subsection*{1. Function and Policy}

Regardless of the adequacy of the facts alleged, a statute of limitations may serve to bar a claim.\footnote{53} Statutes of limitation impose time limits on claims that can be brought before a court.\footnote{54} Almost every claim, with the exception of some criminal charges, has a relevant statute of limitations specifying the timeframe in which the claim must be brought.\footnote{55} Either the court or the defendant can raise the issue.\footnote{56} If the court determines that the statute of limitations has run, the court will dismiss the action.\footnote{57}

Statutes of limitation serve two primary purposes, both generally benefiting defendants. The first purpose is to prevent bias and excessive cost.\footnote{58} The evidence necessary to successfully defend a claim may be lost or altered with the passage of time.\footnote{59} A statute of limitations prevents plaintiffs from waiting to bring a claim until the defendant’s position becomes too difficult or costly to prove.\footnote{60}

\footnote{52. \textit{Noske}, 670 N.W.2d at 743 (citing N. States Power Co. v. Franklin, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963)); \textsc{Minn. R. Civ. P.} 12.02.}

\footnote{53. \textit{See}, e.g., \textsc{Minn. Stat.} § 54.1.05 (2018).}

\footnote{54. \textit{See id.} Backertz v. Hayes-Lucas Lumber Co., 201 Minn. 171, 176, 275 N.W.2d 694, 697 (Minn. 1937) (stating that the “general purpose [of statutes of limitation] is to prescribe a period within which a right may be enforced, afterwards withholding a remedy for reasons of private justice and public policy”) (citation and internal quotations omitted).}

\footnote{55. \textit{Dobbs}, supra note 5, § 241.}

\footnote{56. \textit{See, e.g.}, Lowry Hill Properties, Inc. v. Ashbach Constr. Co., 291 Minn. 429, 441, 194 N.W.2d 767, 775 (1971) (citing \textsc{Minn. R. Civ. P.} 8.03) (holding that statutes of limitations must be pleaded as an affirmative defense); Mercer v. Andersen, 715 N.W.2d 114, 119 (Minn. Ct. App. 2006) (holding that the lower court had authority to consider the statute of limitations even though the defendant did not raise it).}

\footnote{57. \textit{See}, e.g., Antone v. Mirviss, 720 N.W.2d 331, 333 (Minn. 2006).}

\footnote{58. \textit{Id}; \textit{Dobbs}, supra note 5, § 241.}

\footnote{59. \textit{Antone}, 720 N.W.2d 331; \textit{Dobbs}, supra note 5, § 241.}

\footnote{60. Bachertz v. Hayes-Lucas Lumber Co., 201 Minn. 171, 176, 275 N.W. 694, 697 (1937).}
The second purpose is security. Tort claims can be quite costly for defendants and their insurers. This is especially true for professionals and businesses that provide specialized services affecting peoples’ livelihood or health, and even more so for professionals that provide services to a large number of clients. Statutes of limitation allow defendants to arrange their personal lives and business affairs without fear of indefinite liability.

Limitations periods vary in length. For example, in Minnesota, an action for libel or slander must be brought within two years, while an action for legal malpractice has a more generous limitations period of six years.

a. Accrual

While the length of the limitations period is specified by statute, the moment the time period begins, or the clock begins to run, is often left up to the courts. This moment is referred to as the cause of action’s “accrual.” Accrual of a statute of limitations is a contested issue because it necessarily coincides with the deadline for the plaintiff to bring their claim. For plaintiffs, meeting or missing this deadline can be the difference between a big damage award or having their claim dismissed. For defendants, getting a claim dismissed saves a potential payout to the plaintiff, not to mention the cost, time, effort, and reputational repercussions associated with defending the claim on its merits.

For the sake of predictability, a cause of action’s accrual is often governed by an “accrual rule.” These rules vary by type of claim,
length of the relevant statute of limitations, and jurisdiction. For example, a jurisdiction with a relatively short statute of limitations for a particular claim may abide by a more generous accrual rule, while a jurisdiction with a longer limitations period may abide by a rule that sets accrual earlier in time.

1. The Occurrence Rule

Historically, a cause of action accrued when the negligent act occurred, regardless of whether the plaintiff knew of the negligence or of their injury. Courts applying this rule sought to reinforce the policies behind statutes of limitation and reasoned that, in the absence of fraud, courts should encourage diligence and discourage unreasonable delay. The Minnesota Supreme Court has long held that “ignorance of the existence of the cause of action” is not an exception under which a court would pause or ignore a statute of limitations.

In some instances, the occurrence rule is harsh on plaintiffs who are reasonably unaware until years later that the negligent act occurred or that they were injured. Additionally, timing can be an issue: a negligent act and the corresponding injury do not always

68. Dobbs, supra note 5, § 241.
69. See, e.g., John Kohl & Co. v. Dearborn & Ewing, 977 S.W.2d 528 (Tenn. 1998) (applying the more generous “discovery rule” where the statute of limitations was one year); Edwards v. Dunlop-Gates, 344 S.W.3d 424 (Tex. Ct. App. 2011) (applying the discovery rule where the statute of limitations was two years).
70. See, e.g., Antone, 720 N.W.2d at 331 (applying the damage rule where the statute of limitations was six years).
71. American Mut. Liability Ins. Co. v. Reed Cleaners, 265 Minn. 503, 506, 122 N.W.2d 178, 180 (1963) (holding the claim accrued on the date of the accident); Mast v. Easton, 33 Minn. 161, 163, 22 N.W. 253, 254 (1885) (holding the claim accrued on the date the defendant failed to perform a duty).
73. Weston, 160 Minn. at 36, 199 N.W. at 433 (citing Mast, 33 Minn. at 163–64, 22 N.W. at 254).
74. See, e.g., Shearin v. Lloyd, 98 S.E.2d 508 (N.C. 1957) (holding the medical malpractice claim accrued on the date of the operation even when the plaintiff did not know the doctor surgeon had left a sponge in her body).
coincide, producing procedural issues, and sometimes neither can be tied to a specific moment in time. Thus, in the 1960s and 70s, courts began to abandon the occurrence rule in favor of more flexible and nuanced accrual rules.

2. The Discovery Rule

Some courts responded to the harshness of the occurrence rule by adopting the “discovery” rule. Under the discovery rule, the accrual period begins as soon as a reasonable person would be aware of the claim, regardless of when the negligent act or injury occurred.

While the discovery rule obviates the harshness of the occurrence rule for plaintiffs, it creates substantial uncertainty for defendants and creates the risk of inconsistent application by the courts. For example, courts may disagree about when a reasonable person discovers an injury—is it upon the first showing of symptoms, or upon diagnosis by a medical professional? Moreover, discovery of what? The injury, the defendant’s possible negligence, or the connection between the two?

The uncertainties tied to the discovery rule have two chief adverse results. First, potential defendants may face liability for actions taken many years—if not decades—in the past, contravening the “repose” policy of statutes of limitation. Second, determining the

75. Antone, 720 N.W.2d at 335 (“[T]he occurrence rule ‘encourages speculative litigation that can involve the client, the attorney and the courts in wasteful economic behavior.’” (quoting 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 22.10, at 303 (2006))); Dobbs, supra note 5, § 242 (“Such a provision could bar the claim before the plaintiff could sue.”).

76. See Bonhiver v. Graff, 311 Minn. 111, 115–18, 248 N.W.2d 291, 295–96 (1976) (noting that the dates of negligence and injury were unclear because allegations were based on a series of transactions).


78. Antone v. Mirviss, 720 N.W.2d 331, 335 (Minn. 2006) (“[U]nder the ‘discovery’ rule… the cause of action accrues and the statute of limitations begins to run only when the plaintiff knows or should know of the injury.”).

79. See generally Dobbs, supra note 5, at § 243 (discussing the discovery rule’s complicated terrain).

80. See, e.g., Stahle v. CTS Corp., 817 F.3d 96, 99 (4th Cir. 2016) (showing the lawsuit was filed in 2014 based on alleged exposure to toxic chemicals from 1959 to
proper accrual date may involve a fact-specific analysis that is most appropriately determined by a jury, rather than a judge, thus requiring more time, effort, and money dedicated to defending the claim. This undercuts the statute’s function in barring the claim because it creates, rather than eliminates, issues for trial.

3. The Damage Rule

Many courts found a different solution to the occurrence rule. The circuit courts of appeals gradually adopted the “damage” rule, under which the claim accrues on the date the plaintiff first incurred legally cognizable damage. The circuit courts reasoned generally that a court cannot require a plaintiff to bring a claim before the plaintiff can establish each of the claim’s elements, including damages. Requiring suit before this would result in speculative litigation.

Persuaded by the circuit courts’ reasoning, the Minnesota Supreme Court definitively adopted the damage rule in 1968 when it decided Dalton v. Dow Chemical Co., a case dealing with a toxic tort claim. Toxic torts—or personal injury claims in which the plaintiff alleges injury caused by exposure to a toxic substance—are especially susceptible to statutes of limitation issues because the negligence and the injury occur over a period of time, and the resulting diseases can take years to manifest. Nevertheless, the court balanced this injustice against limitations policies and settled on the damage rule for torts in general, expressly rejecting the discovery rule. The

1968); Antone, 720 N.W.2d at 333 (showing the lawsuit was filed nearly seventeen years after defendant’s malpractice).

82. See, e.g., Brush Beryllium Co. v. Meckley, 284 F.2d 797, 800 (6th Cir. 1960); U.S. v. Reid, 251 F.2d 691, 694 (5th Cir. 1958) (“[I]t is not the wrongful, i.e., negligent act, which gives rise to the claim. For there must be damage caused by it.”); Carnes v. U.S., 186 F.2d 648, 650 (10th Cir. 1951) (quoting Schmidt v. Merchants Despatch Transp. Co., 200 N.E. 824, 827 (N.Y. 1936) (“It is only the injury to person or property arising from negligence which constitutes an invasion of a personal right, protected by law, and, therefore, an actionable wrong.”)).
83. See, e.g., Brush, 284 F.2d 797; Reid, 251 F.2d 691; Carnes, 186 F.2d 648.
85. See Dobbs, supra note 5, § 243.
86. See Dalton, 280 Minn. at 154–55, 158 N.W.2d at 585.
Minnesota Supreme Court first applied the damage rule to a professional malpractice claim in 1976, then specifically to a legal malpractice claim in 1999.

Of course, to know when “damage” occurred, one must determine precisely what constitutes damage within the context of the claim. In *Antone v. Mirviss*, the Minnesota Supreme Court ruled that within the context of a negligently drafted antenuptial agreement, compensable damage occurs, and therefore a claim accrues on the marriage date. The court reasoned that the marriage is the point at which the married person loses the ability to protect his or her property from a divorcing spouse, and that this loss of ability constitutes sufficient damage to support the damage element of the claim. Thus, no matter how small the damage amount is on day one of the marriage, or how large it may grow to be by the time the client discovers the malpractice and sues the attorney, the client incurs damage when he or she passes the “point of no return”—the marriage date.

**b. Other Plaintiff Protections: Tolling and Estoppel**

As with most rules, statutes of limitation have exceptions. These are especially necessary in jurisdictions with short limitations periods, or defendant-favoring accrual rules. A statute of limitations may be “tolled”—or paused—in certain circumstances under which it would be equitable to do so. In these situations, the court maintains the same period specified in the statute but tolls it or delays its start until the extraordinary circumstance no longer exists.

A statute of limitations may be wholly ignored if the defendant causes the delay, in which case the defendant is “estopped” from


88. See Herrmann v. McMenomy & Severson, 590 N.W.2d 641 (Minn. 1999).

89. Antone v. Mirviss, 720 N.W.2d 331, 337 (Minn. 2006). The Antone court also expressly rejected arguments that the plaintiff’s claim accrued either when he incurred legal fees defending his assets in his divorce or when the assets were awarded to his ex-wife. This came too close to the discovery rule, and therefore, too close to uncertainty in the law and open-ended liability for attorneys. Id. at 338–39.

90. Id. at 338–39.

91. Id. at 337.

92. DOBBS, supra note 5, § 246 (listing the plaintiff’s minority, mental incompetence, or incarceration as examples).

93. Id.
A defendant most often causes the delay by fraudulently concealing the cause of action. When a plaintiff alleges fraudulent concealment, Minnesota law requires courts to apply discovery rule principles, in which the statute of limitations accrues as soon as the plaintiff knows or reasonably should know of the cause of action.

2. Separating Negligence Claims

When the statute of limitations has run and no tolling rule applies, the plaintiff has one more option: alleging a separate claim with a separate, more favorable limitations period. For example, if the plaintiff has a choice of jurisdiction or forum in which to sue, it may be that one of the jurisdictions has a more forgiving statute of limitations. The plaintiff may also be able to choose between legal theories. For instance, some sets of facts may support either a tort claim or a breach of contract claim, and a late-suing plaintiff may choose the theory with the longer corresponding limitations period.

Another option is to allege a separate act of negligence occurring later in time. The Minnesota Supreme Court has suggested that multiple causes of action for negligence can arise out of the same set of facts. However, before deciding Frederick v. Wallerich, the court had not addressed how or when a plaintiff can successfully allege separate claims.

The question of separating claims appears in three unpublished opinions by the Minnesota Court of Appeals. First, in Devereaux v.
Stroup, the court of appeals held that when an attorney gave bad tax advice and then performed negligent litigation services during the resulting lawsuit, the two acts gave rise to separate claims, each with its own statute of limitations.\textsuperscript{100} The court’s primary reasons were that the two acts occurred at different times, the second act worsened the client’s position, and the two acts were “distinct.”\textsuperscript{101}  

In Nash v. Gurovitsch, an attorney handling his client’s divorce failed to pursue a waiver which would have prevented his client’s ex-wife from later asking the court to increase spousal maintenance.\textsuperscript{102} When the client’s ex-wife eventually asked the court to increase spousal maintenance, the judge awarded the increase based on a statement in the client’s affidavit that was prepared by the attorney.\textsuperscript{103} The client sued the attorney, alleging that the failure to pursue the waiver and the alleged negligent drafting of the affidavit were separate claims.\textsuperscript{104} The court agreed, stating that because “[t]he two acts occurred at different times, [they] are not necessarily causally connected, and arose in legal representation concerning different proceedings.”\textsuperscript{105}  

Finally, in Gearin v. Bailey’s Nurseries, Inc., the defendant negligently dumped soil in the plaintiff’s backyard.\textsuperscript{106} The court held that the subsequent act of moving the soil to her neighbor’s property was not a separate act of negligence because it was related to mitigating the damage.\textsuperscript{107} The court also held that the resulting seepage of toxins into the plaintiff’s drinking water was not a separate act because it was a “progression” of the first negligent act of dumping the soil.\textsuperscript{108} These three cases ultimately provided the foundation for the five-factor balancing test established in Frederick v. Wallerich.\textsuperscript{109}  

\textsuperscript{101} Id. at *3.  
\textsuperscript{103} Id.  
\textsuperscript{104} Id. at *2.  
\textsuperscript{105} Id. at *2.  
\textsuperscript{107} Id. at *2.  
\textsuperscript{108} Id.  
\textsuperscript{109} 907 N.W.2d 167, 175–76 (Minn. 2018); see infra, Part D: The Minnesota Supreme Court Decision.
III. FREDERICK V. WALLERICH

A. Dissolution Proceeding

On September 28, 2006, Joseph Frederick hired Kay Wallerich, an attorney at Farrish Johnson Law Office in Mankato, Minnesota, to draft an antenuptial agreement before he married Cynthia Gatliff.¹¹⁰ The agreement stipulated that Gatliff would not receive Frederick’s premarital assets or appreciation therefrom if the couple divorced.¹¹¹ The couple married the next day, on September 29, 2006.¹¹²

In September of 2007, Frederick met with Wallerich again to plan and draft a new will.¹¹³ Frederick alleged that at that meeting, Wallerich assured him the antenuptial agreement was enforceable,¹¹⁴ and addressed it in the will.¹¹⁵ Frederick continued to hire Wallerich for related matters until 2011.¹¹⁶

Frederick and Gatliff began discussing divorce in the fall of 2012, and Gatliff served Frederick with dissolution papers in December of 2012.¹¹⁷ Gatliff argued in the dissolution proceeding that the antenuptial agreement was unenforceable because it lacked the statutorily-required witness signatures,¹¹⁸ and that she was therefore entitled to the share of Frederick’s assets that the agreement aimed to protect—his premarital assets and their appreciation during the

¹¹⁰ Frederick v. Wallerich, 907 N.W.2d 167, 170 (Minn. 2018).
¹¹¹ Id.
¹¹² Id. at 171.
¹¹³ Id.
¹¹⁴ Id.
¹¹⁵ Id. at 171. But see id. at 185 (Gildea, C.J., dissenting) (“I have entered into an Antenuptial Agreement prior to executing this Will. I have intentionally omitted my spouse from taking under this will as we have provided for bequests at our death by separate written instrument dated September 28, 2006 [the antenuptial agreement]. Should such instrument be deemed void pursuant to law, it is my intent to omit my spouse from taking under this Will.”).
¹¹⁶ Id. at 171.
¹¹⁸ Minn. Stat. § 519.11, subdiv. 2 (2016) (“Antenuptial . . . contracts . . . shall be in writing, executed in the presence of two witnesses and acknowledged by the parties . . . ”).
marriage. The judge agreed with Gatliff and ordered the parties to participate in appellate mediation. Mediation resulted in settlement, in which Frederick agreed to pay Gatliff a share of his premarital assets, including appreciation. Frederick paid Gatliff $1 million more than he would have if the antenuptial agreement had been enforceable.

B. Frederick v. Wallerich in the District Court

In September of 2013, in the midst of the dissolution proceedings, Frederick filed suit against Wallerich and Farrish Johnson (collectively "Wallerich"). As to the drafting of the antenuptial agreement in 2006, the six-year statute of limitations had undisputedly run. Nevertheless, Frederick sued Wallerich for legal malpractice, breach of fiduciary duty, negligent/reckless misrepresentation, and fraudulent concealment to induce equitable tolling of the statute of limitations. The district court ruled that all four claims arose out of the same incident, and thus dismissed all but the legal malpractice claim.

With no tolling or alternative claims available, Frederick asserted that the court should view his case like Devereaux, in which separate negligent actions by an attorney throughout representation were considered separate instances of malpractice for statute of limitations purposes. Specifically, Frederick asked the court to consider each family law and estate planning meeting with Wallerich.
as potential separate instances of malpractice. If the court was willing to do this, the statute of limitations would not have accrued until less than six years before the suit was filed, allowing Frederick to continue to pursue his claim.

Wallerich moved to dismiss, arguing that the only compensable damages Frederick could allege stemmed from the 2006 drafting and that, unlike in Devereaux, none of her subsequent legal services aggravated those damages. The district court agreed, holding that Frederick could not allege separate damages, and that according to Antone, his claim accrued on the date of his marriage to Gatliff. The district court also noted that as a policy matter, “splitting” the claims as Frederick suggested would be contrary to the purpose of statutes of limitation and would essentially amount to tolling, an equitable protection that the court had already decided not to extend. Moreover, the district court posited that separating the claims would resemble an adoption of the continuous representation doctrine, which can only be applied in rare circumstances when the accrual date cannot be determined. The district court granted Wallerich’s motion and dismissed the claim altogether.

131. Frederick v. Wallerich, 907 N.W.2d 167, 173 (Minn. 2018). (“Because Frederick filed his legal-malpractice claim on September 10, 2013, there must be a separate claim that accrued on or after September 10, 2007, for the filing to be timely.”).
133. Id. at *3 (explaining that under the damage rule, “damages” are broadly defined as any compensable damage as determined by the court, regardless of whether the plaintiff properly identifies them in the complaint).
134. Id. at *4.
135. See id. at *3.
136. Id. at *5 (comparing Carlson v. Houk, No. A14-0633, 2014 WL 6090685, at *5 (Minn. Ct. App. Nov. 17, 2014) (refusing to apply the continuous representation doctrine because the plaintiff’s damages were attributable to discrete, determinable instances of malpractice), with Bonhiver v. Graff, 311 Minn. 111, 116–18, 248 N.W.2d 291, 296 (Minn. 1976) (setting the accrual date at the representation end date only after the court concluded it could not determine the precise date on which damage was incurred)).
137. Id. at *5.
C. Frederick v. Wallerich in the Minnesota Court of Appeals

Frederick appealed, and the court of appeals affirmed. The court of appeals agreed that Frederick's only cognizable damage accrued on the date of his marriage and agreed that the case was different from Devereaux because none of Wallerich's later legal services "significantly worsen[ed] or enhance[d]" Frederick's damages from the 2006 act.

The court also affirmed the dismissal of Frederick's claims for breach of fiduciary duty and negligent/reckless misrepresentation, reasoning that those claims fell under "the penumbra of his legal-malpractice action." Finally, the court held that Frederick did not allege sufficient facts to support equitable tolling for his fraudulent concealment claim. The court reasoned that the antenuptial agreement included lines for witness signatures that were obviously blank, belying a claim that their blankness could have been concealed. Additionally, Frederick failed to allege any intentional misconduct on Wallerich's part, a key element of fraud.

D. The Minnesota Supreme Court Decision

The Minnesota Supreme Court granted review to decide, as a matter of first impression, how and when a plaintiff can allege separate acts of legal malpractice for purposes of statutes of limitation accrual dates. In a 5-2 decision, the Minnesota Supreme Court reversed the court of appeals and remanded the case to the district court. The court held that Wallerich's 2007 services for Frederick created an independent cause of action because they were sufficiently independent from Wallerich's initial negligent acts in 2006. The court determined, and the parties did not dispute, that the attorney-
client relationship element was clearly satisfied in 2007, just as it was in 2006.\textsuperscript{147} Therefore, what ultimately qualified the two claims as separate arose out of a special analysis of the other three elements: (1) [W]hether Wallerich’s [2007] failures . . . could be independent acts of negligence from the negligent execution of the antenuptial agreement itself; (2) whether Frederick suffered damages caused by these failures; and (3) whether those damages are independent of the damages attributable to the negligent execution of the antenuptial agreement.\textsuperscript{148}

Writing for the majority, Justice Hudson laid out a five-factor balancing test, gleaning factors from the three Minnesota Court of Appeals cases that addressed the issue—\textit{Devereaux}, \textit{Gearin}, and \textit{Nash}.\textsuperscript{149} The court held that the negligent drafting of the antenuptial agreement in 2006 and the incorporation of it into the will in 2007 are separate acts of negligence with separate statutes of limitations because: (1) the second act “significantly worsened” Frederick’s position; (2) the two acts were of different “types”; (3) the [two] acts occurred at different times and, importantly, during different transactions; (4) the second act did not flow causally from the first; and (5) the second act relied explicitly on the prior work.\textsuperscript{150} In a subsequent, unrelated malpractice case, the court suggested that the indispensable condition was that “additional damages” arose out of the “second negligent act.”\textsuperscript{151}

Throughout the \textit{Frederick} opinion, the court offered some caveats. First, at the first mention of the five factors, the court indicated that the list of factors was not exhaustive and would not apply to every case.\textsuperscript{152} Second, the court noted that to successfully separate the claims, Frederick would need to convince the fact-finder of independent damages and causation.\textsuperscript{153} Finally, the court stressed

\begin{thebibliography}{99}
\bibitem{147} Id. at 173.
\bibitem{148} Id. at 173–74 (emphasis omitted).
\bibitem{149} Id. at 170, 175–76.
\bibitem{150} Id. at 176.
\bibitem{151} Sec. Bank & Trust Co. v. Larkin, Hoffman, Daly & Lindgren, 916 N.W.2d 491, 499 (Minn. 2018) (quoting Frederick, 907 N.W.2d at 179) (emphasis in original).
\bibitem{152} Frederick, 907 N.W.2d at 176 n.5 (“Although we found these facts helpful in our analysis here, we do not suggest that these are the exclusive considerations, nor that these considerations will be helpful in every case.”).
\bibitem{153} Id. at 175–76, 181.
\end{thebibliography}
that the procedural posture of the case—the pleading stage—was important.\textsuperscript{154} Because the question in this case revolved around a motion to dismiss at the pleading stage, the holding was limited to whether the plaintiff had minimally alleged legal malpractice in the complaint, rather than proven his claim.\textsuperscript{155}

\textit{E. The Dissent}

Chief Justice Gildea, joined by Justice Anderson, dissented on all fronts.\textsuperscript{156} The dissent reasoned that allowing Frederick to separate his claims on the facts alleged amounted to overruling \textit{Antone} for cases where the client and the attorney who drafted the antenuptial agreement continue to work together.\textsuperscript{157} The dissent would have held that, consistent with \textit{Antone}, Frederick’s only claim accrued on the date of his marriage.\textsuperscript{158}

The dissent emphasized that under the damage rule, “damage” is any legally cognizable damage. Defined broadly, it does not matter what damages are identified in the complaint, how or when the ultimate amount at issue accrued, or when that ultimate amount became calculable.\textsuperscript{159} Rather, “damage” accrued at the point of no return, when Frederick lost the full ability to defend his assets on the date of his marriage.\textsuperscript{160}

Further, the dissent argued against the five-factor test, regardless of whether \textit{Antone} applied.\textsuperscript{161} It reasoned that because Frederick did not successfully allege a separate claim under any reasonable test, setting out a standard for separate claims is inappropriate.\textsuperscript{162} Moreover, the dissent called the five-factor test unworkable and predicted it would cause confusion in future malpractice actions.\textsuperscript{163}

Finally, the dissent argued against the court’s application of its five-factor test.\textsuperscript{164} First, the dissent disagreed with the court’s characterization of “additional damages,” asserting that appreciation

\begin{itemize}
  \item \textsuperscript{154} Id. at 181.
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} Id. at 181–86 (Gildea, C.J., dissenting).
  \item \textsuperscript{157} Id. at 181.
  \item \textsuperscript{158} Id. at 184.
  \item \textsuperscript{159} Id. at 183 (citing \textit{Antone v. Mirviss}, 720 N.W.2d 331, 336, 338 (Minn. 2006)).
  \item \textsuperscript{160} Id.
  \item \textsuperscript{161} Id. at 185.
  \item \textsuperscript{162} Id.
  \item \textsuperscript{163} Id. at 181.
  \item \textsuperscript{164} Id. at 185–86.
\end{itemize}
of already irrevocably compromised assets did not qualify as “additional” because no act in 2007 caused that appreciation.\textsuperscript{165} Second, the will’s mention of the antenuptial agreement was irrelevant because the will neither “incorporated” it, nor relied on it.\textsuperscript{166}

\section*{IV. Analysis}

This analysis begins by addressing the significance of the Frederick case in the local legal community and highlighting some of the problematic standards set by the court’s decision. It continues by proposing a clearer way to frame the issue, focusing on the ideas of breach and causation, which would not alter the court’s decision, but would make the law in this area more navigable. Next, this analysis examines an approach that focuses on duty, and concludes with recommendations as to how attorneys might better manage attorney-client relationships and avoid liability.

\subsection*{A. Predictions and Reactions}

\subsubsection*{1. Uncertainty in the Legal Community}

Pending the Minnesota Supreme Court’s decision, the case was closely watched by members of the local legal community.\textsuperscript{167} Fearing increased exposure to malpractice claims, one commentator predicted the decision “could make it easier for clients to get around Minnesota’s statute of limitations for legal malpractice claims and sue their lawyers.”\textsuperscript{168} Conversely, a Minnesota State Bar Association Bench and Bar reporter argued that the bright-line rule setting accrual on the date of the marriage is too harsh on plaintiffs.\textsuperscript{169} Because of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{165}Id. at 185.
\item \textsuperscript{166}Id. (emphasis omitted).
\item \textsuperscript{167}Mike Mosedale, \textit{Legal Malpractice Case Raises Exposure Fears, Minnesota Lawyer} (Mar. 14, 2017), https://minnlawyer.com/2017/03/14/legal-malpractice-case-raises-exposure-fears/ [https://perma.cc/7GDZ-DXJU].
\item \textsuperscript{168}Id.
\item \textsuperscript{169}MSBA in Action, 75-MAR Bench & B. Minn. 6 (“We agree with the Minnesota State Bar Association and note that [the] rule [advanced by appellant] is too broad because it assumes that every client, in revisiting previous work, prefers the last
significance of the decision on Minnesota legal malpractice claims, three attorney organizations submitted briefs as amici curiae.

2. Amici—Advocating for Clear Standards

The Minnesota State Bar Association (MSBA), the American Academy of Matrimonial Lawyers (AAML), and the Professional Liability Defense Federation (PLDF) weighed in with amicus briefs. All were motivated by an interest in clearly articulated legal principles for malpractice.

The AAML and the PLDF filed in support of Wallerich. Both characterized Frederick's theory of the case as an attempt to elude the statute of limitations on Wallerich's negligence in 2006. The PLDF advocated for strict application of the Antone rule, reasoning that consistent, predictable application outweighs the occasional harshness of statutes of limitation.

The AAML also advocated for the Antone rule. Additionally, AAML argued that Wallerich's assurances in 2007 did not constitute legal advice and, moreover, that Frederick failed to allege distinct damages flowing from the 2007 meeting. Further, the AAML feared a ruling in Frederick's favor would create a "system of perverse incentives" within continuing attorney-client relations: attorneys

option: to have the attorney conduct new research and analysis every time a client asks a question. We therefore reject [appellant's] proposed bright-line rule.

170. Brief for the Minnesota State Bar Association as Amicus Curiae, Frederick, 907 N.W.2d 167 (No. A15-2052), 2016 WL 8467740 [hereinafter MSBA Brief].

171. Brief for the Minnesota Chapter of the American Academy of Matrimonial Lawyers as Amicus Curiae Supporting Respondents, Frederick, 907 N.W.2d 167 (No. A15-2052), 2017 WL 957391 [hereinafter AAML Brief].


173. MSBA Brief, supra note 170, at *1; AAML Brief, supra note 171, at *1; PLDF Brief, supra note 172, at *2.

174. AAML Brief, supra note 171, at *7 (“Frederick attempts to elude the statute of limitations by dividing his ‘damages’ into those resulting from the improperly drafted antenuptial agreement, and those incurred because of Wallerich’s later reassurances as to its validity.”); PLDF Brief, supra note 172, at *9 (“[A] party should not be allowed to manipulate the statute of limitations by artful construction of a pleading through reference to multiple acts.”).

175. PLDF Brief, supra note 172, at *1–4.

176. AAML Brief, supra note 171, at *4, *7.

177. Id. at *6.
would become reluctant to consult with returning clients if they incurred new duties each time, and savvy clients might extend statutes of limitation by asking for regular reassurances of the validity of prior work.

The MSBA remained neutral. The MSBA’s brief advocated for a rule under which an attorney’s duty to their client is limited to the scope of the engagement as agreed upon, whether orally or in writing, in the retainer agreement. Under this “scope of engagement” rule, if the court found the facts in the complaint sufficient to support a specific, agreed-upon duty to review the antenuptial agreement, the court could allow Frederick to continue to pursue his claim.

3. Creating Uncertainty

The purpose of a state supreme court’s power of review is to clarify the law and set precedent for lower courts in the interest of creating and maintaining a coherent body of law for the state’s citizens. However, when Frederick was published, the decision raised more questions than it answered. Commentators disagreed

178.Id. at *2–3.
179.Id. at *8–9.
180.MSBA Brief, supra note 170, at *11.
181.Id. at *17.
182.Minn. R. Civ. App. P. 117, subdiv. 2; Minnesota Court Rules: Appellate Procedure, Case Dispositional Procedures of the Minnesota Supreme Court: Obtaining Discretionary Review, The Office of the Revisor of Statutes (2011), https://www.revisor.mn.gov/court_rules/rule/apcase/ ("[T]he Supreme Court's primary role in reviewing Court of Appeals decisions is to set precedent that develops and clarifies the law on important issues of broad impact.").
about whether the decision made the law clearer. Commentators also disagreed whether the decision abandoned *Antone*. Despite this disagreement, one thing seemed certain: like the *Togstad* decision in 1980, *Frederick v. Wallerich* would affect attorney exposure to malpractice claims.

**B. Fact-Specific Inquiry: No Easy Task**

One attorney recommended that firms “have knowledgeable counsel conduct the fact-specific inquiry outlined by the court.” However, even if firms follow this advice, attorneys and courts will likely run into issues applying the *Frederick* test to other factual scenarios because, as one attorney suggested, the holding seemed limited to specific facts:

In this case, the new legal work, drafting of a new will, combined with the failure to determine if the antenuptial agreement that was incorporated into the will was still valid, combined with the lost

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opportunity to prevent additional damages from occurring (some
damage), can start a new legal malpractice claim.188

Nevertheless, attorneys may be confronted with the five-factor
test if the statute of limitations is at issue in a malpractice claim.
Tackling this test may be a difficult endeavor because the “different
types” and “separate times and separate transactions” factors are
susceptible to different interpretations and, therefore, inconsistent
application by courts.

1. Inconsistent Application

a. Different Types

First, the two acts being of "different types" invites inconsistent
application because it invites parsing and cherry-picking of facts. In
Frederick, the court of appeals held that the two acts—the negligent
drafting of the antenuptial agreement and the bad advice a year
later—related to the same legal issue: the antenuptial agreement.189

The Minnesota Supreme Court acknowledged this was true, but
explained that nevertheless, the two acts were sufficiently different
because they involved different areas of law (family and estate
planning) and different legal projects (an antenuptial agreement
and a will).190 The dissent pushed back, taking the court of appeals’
reasoning one step further: “for all practical purposes, Frederick
alleges merely one error that was repeated: Wallerich failed to secure
an enforceable antenuptial agreement . . . .”191 The divergence of

188. Robert A. McLeod, 2018 Non-Tax Case Law Update, 2018 Probate & Trust
Law Section Conference-June 4 & 5, 2018, at 2, https://www.minncle.org/eAccess/1
020951801/Plen_Day_1_9am_Mcleod.pdf [https://perma.cc/P64A-8X2Q].
Aug. 1, 2016) (“[T]he alleged misconduct from 2006–2011 is limited to improper
advice concerning the validity of the antenuptial agreement.”).
190. Frederick v. Wallerich, 907 N.W.2d 167, 175–76 (Minn. 2018) (“Wallerich’s
negligent conduct in 2007—failing to advise Frederick of the invalidity of the
antenuptial agreement—spanned multiple areas of law (estate planning and marital
planning), and multiple legal projects (execution of a will and an antenuptual
agreement).”).
191. Id. at 184 (Gildea, C.J., dissenting) (stating that Fredrick also later “failed to
verify that the agreement she had secured was in fact enforceable.”).
opinions shows that courts and attorneys will likely continue to differ on the issue of “different types” of negligent acts.\textsuperscript{192}

The “different types” factor was applied differently in \textit{Togstad}, where the Minnesota Supreme Court reviewed the lower court’s decision to instruct the jury on two separate theories of negligence.\textsuperscript{193} The first theory was whether the defendant-attorney failed to adequately research the viability of Ms. Togstad’s claim before informing her that he did not think she had a claim.\textsuperscript{194} The second theory was whether it was negligent not to advise Ms. Togstad on the statute of limitations for her potential claim.\textsuperscript{195} The court characterized both as negligent legal advice.\textsuperscript{196}

\textit{b. Separate Times and Separate Transactions}\n
The “separate times and separate transactions” factor invites inconsistent application because it is not supported by the cases. Though it may be conceptually clearer that actions are separate if they occurred at separate times and in separate transactions, the fact that they occurred at the same time has not precluded separation of negligence theories in the past.\textsuperscript{197} Indeed, for the court’s threshold proposition that multiple causes of action for negligence can arise out of the same set of facts, it cites two cases where the two separate negligent acts occurred at the same time.\textsuperscript{198} In \textit{Togstad}, the court separately evaluated two claims arising from one meeting, where no other communication between the attorney and client occurred.\textsuperscript{199} In \textit{Capitol Supply}, the court held that there were two relevant statutes of limitation arising out of the same event where the plaintiff adequately

\textsuperscript{192}See Antone v. Mirviss, 720 N.W.2d 331, 338 (citing a difference in application of a legal rule between the court of appeals and dissent as evidence the rule would create ambiguity in the law).

\textsuperscript{193}Togstad v. Vesely, 291 N.W.2d 686, 694 (Minn. 1980).

\textsuperscript{194}Id.

\textsuperscript{195}Id.

\textsuperscript{196}Id. at 693–94 (explicitly referring to and treating both actions as legal advice).

\textsuperscript{197}See, e.g., Capitol Supply Co. v. St. Paul, 316 N.W.2d 554, 554–55 (Minn. 1982); Togstad, 291 N.W.2d at 690.

\textsuperscript{198}Frederick v. Wallerich, 907 N.W.2d 167, 174–75 (Minn. 2018) (citing Togstad and Capitol Supply Co.) (“Our law therefore permits two separate transactions within the same set of facts to be reasonably characterized as separate acts that give rise to independent negligence claims.”).

\textsuperscript{199}Togstad, 291 N.W.2d at 690.
alleged two separate claims: the city “contemporaneously altered the road and redesigned the sewer system.”

Thus, two negligence theories may arise out of acts occurring at the same time. Strictly applied, this factor could bar perfectly valid claims. A court asked to evaluate this factor should be reminded that it may help bolster a finding that two acts were sufficiently separate, but it should not be applied in the inverse to bar separate theories of negligence that occur around the same time or within the same transaction.

2. Other Reasons to Worry

The court’s notions of “additional damages” and “incorporation by reference” should also worry attorneys.

a. Additional Damages

The court’s finding of “additional” damages is suspect. The court held that because Frederick’s assets (which he ultimately lost in the divorce proceeding) had appreciated after the 2007 meeting, Frederick incurred “additional” damages sufficient to support a claim based on the 2007 meeting alone. By the court’s reasoning, a malpractice action stemming from a transaction affecting assets that appreciate can be re-opened any time the attorney assists with a second transaction affecting the same assets. Put another way, if the assets increased in value between the two transactions, there are new and separate damages for purposes of pleading a malpractice claim based solely on the second transaction. The problem with this reasoning is that the attorney’s actions have nothing to do with the market forces that caused the appreciation. As the dissent notes, Frederick’s damages remained unchanged; the value of his assets simply continued to appreciate as they naturally would. Additionally, the fact that Frederick lost an opportunity to mitigate already compromised assets is a problematic theory of harm in tort.

Conversely, if a plaintiff adequately alleges that the attorney’s second act accelerated or compounded the original damages, that

201. Frederick, 907 N.W.2d at 179.
202. Id.
plaintiff may have a sufficient basis for dividing damages. These concepts imply a separate, independent causal force that changes the damages from what they would have been. Further, this notion of additional damages is far less likely to impose liability for a second act.\footnote{203}

As transactional attorneys are likely well aware, clients’ assets tend to appreciate. The court’s definition of separate damages, therefore, should cause transactional attorneys to be wary of handling matters for returning clients. The \textit{Frederick} court’s conclusion regarding “additional damages” could undermine the entire practice of family law, as well as other practice areas that serve regular clients for obviously beneficial reasons, including efficiency, client preference, and attorney business planning.\footnote{204}

\textit{b. Incorporation of Prior Work}

The way the court characterizes “incorporation by reference” is also problematic. As the court notes,\footnote{205} Black’s Law Dictionary defines incorporation by reference as “[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one.”\footnote{206} However, the will in \textit{Frederick} explicitly stated that “[s]hould [the antenuptial agreement] be deemed void pursuant to law, it is my intent to omit my spouse from taking under this Will.”\footnote{207} This statement explicitly provided for the possibility that the antenuptial agreement was invalid. In doing so, the will separated itself from the agreement, declaring that no matter the effect of the agreement, it did not affect the terms of the will. This should worry transactional attorneys, who may make similar cross-references between documents that affect the same assets.

\footnote{203. Cf. Benjamin B. Cooper, \textit{When Clients Sue Their Lawyers for Failing to Report Their Own Malpractice}, 44 Hofstra L. Rev. 441, 443 (2016) (discussing malpractice action based on a failure to report past malpractice) (“[A] client is unlikely to be able to assert a professional negligence claim because the client will typically not be able to establish any additional injury over and above the damage caused by the underlying malpractice.”).}
\footnote{204.AAML Brief, \textit{supra} note 171, at 2–3, 8–9.}
\footnote{205.\textit{Frederick}, 907 N.W.2d at 171 n.1.}
\footnote{206.\textit{Incorporation by Reference}, Black’s Law Dictionary (8th ed. 2004).}
\footnote{207.\textit{Frederick}, 907 N.W.2d at 185 (Gildea, C.J., dissenting).}
C. An Alternative Framework: Breach, Causation, and Damages

To make the law clearer, the court could have used ordinary tort principles to analyze whether Frederick alleged sufficient facts to support a separate breach, separate causation, and separate damages from the original claim. While no in-depth analysis of any of these factors is required at the pleading stage, the court still must determine whether a plaintiff has adequately alleged their legal claim.\textsuperscript{208} Using the Frederick court’s factors within the long-established negligence framework would make it easier for practitioners to navigate and avoid duplicative analysis. This section outlines a way to do this, framing two of the factors under “breach” and two under “causation.”\textsuperscript{209}

1. Breach

Whether two alleged acts of negligence were of different “types,” and whether the acts of negligence occurred at separate times and in separate transactions, appear to examine whether Frederick sufficiently alleged separate instances of breach. Breach in legal malpractice is any instance in which an attorney’s conduct falls below the standard of care of a reasonable attorney.\textsuperscript{210} In the transactional context, Dobbs’ examples of breach include negligently drafting documents, searching records, and giving legal advice.\textsuperscript{211} Here, Wallerich negligently drafted an antenuptial agreement in 2006 and allegedly gave negligent legal advice in 2007.\textsuperscript{212} These two acts align perfectly with the separate examples enumerated by Dobbs.\textsuperscript{213} Accordingly, the court could have asked whether Frederick alleged two separate breaches. Under this analysis, the court could have listed

\begin{footnotesize}
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\textsuperscript{208} Minn. R. Civ. P. 12.02.
\textsuperscript{209} See Frederick, 907 N.W.2d at 176. While there are five factors, the fifth factor (whether “the subsequent act specifically and explicitly incorporated and relied on the continued validity of Wallerich’s prior work”) is somewhat of a threshold matter and asks whether the two acts are sufficiently related that damage seeming to flow from the first could also flow from the second. \textit{Id.}
\textsuperscript{210} Dobbs, \textit{supra} note 5, § 721.
\textsuperscript{211} Dobbs, \textit{supra} note 5, § 721.
\textsuperscript{212} Frederick, 907 N.W.2d at 174, 176–77.
\textsuperscript{213} See Dobbs, \textit{supra} note 5, § 721.
\end{footnotes}
\end{footnotesize}
different types and different times as persuasive factual bases for the breach analysis.

2. **Actual Cause and Damages**

Whether the client, after the first act of negligence, is in a significantly worse position due to the second act of negligence depends on actual causation and separate damages. Actual causation is established if, but for the alleged act of negligence, the harm would not have occurred. Here, the court stated that because Wallerich’s acts in 2007 prevented Frederick from protecting his assets at that time, and “led to” six additional years of appreciation of Frederick’s assets, the “additional damages” would not have occurred without Wallerich’s second act of negligence. The court held that without the alleged act of negligence—Wallerich’s reassurances—Frederick would have avoided a $1 million loss in his divorce.

Additionally, the court’s analysis of this factor duplicated its but-for causation analysis. In its analysis of whether Frederick adequately alleged but-for causation, the court cited the same facts: that but for Wallerich’s negligence in 2007, Frederick would have taken steps, such as divorcing Gatiff, to avoid appreciation of the damages. The court could have combined these two analyses and stated that a significant worsening of the client’s position was instructive as to whether a plaintiff has alleged sufficiently separate but-for causation.

3. **Proximate Cause**

Whether there is a causal connection between the two negligent acts such that the second was a natural progression of the first, or was unavoidable after the first act occurred, is a question of proximate cause. Proximate cause serves the purpose of limiting liability when

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214. At first glance, this factor looks like a question of “Superseding Cause,” but rather than asking this question for purposes of whether Wallerich should be relieved of liability for the first act because of the occurrence of the second act, a question irrelevant to this case, the court uses this factor to divide causation and damages. See *Frederick*, 907 N.W.2d at 175.

215. See, e.g., Noske v. Friedberg, 670 N.W.2d 740, 744 (Minn. 2003); Togstad v. Vesely, 291 N.W.2d 686, 695 (Minn. 1980).

216. *Frederick*, 907 N.W.2d at 175.

217. *Id.*

218. *Id.* at 180.

a negligent act is a but-for cause, but for policy reasons, the defendant should not be held liable. When there are two alleged causes at issue, the second-in-time cause can only supersede the first if it "change[s] the natural course of events by making the result different from what it would have been" if only the first cause had existed. If the second act was unavoidable as a result of the first, then it cannot be a superseding cause, and thus cannot be the proximate cause of damages. If the second act is unavoidable as a result of the first, then the two are considered to be part of an unbroken "chain of events," proximately caused by the first act only. Here, the two acts at issue were both but-for causes according to the court. The court established, and the parties did not dispute, that the negligence in 2006 would have supported a cause of action had it not been barred by the statute of limitations, and that Frederick sufficiently alleged that the 2007 act was a but-for cause. Because the court found two but-for causes, a simple analysis of whether the first act made the other unavoidable, informed by authority on proximate cause, would be a clearer way to analyze this issue.

220.Id. (quoting William L. Prosser, The Minnesota Court on Proximate Cause, 21 MINN. L. REV. 19, 22 (1937)) ("[L]egal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in imposing liability.").

221.STEENSON, supra note 6, § 27.20.

222.Id. (citing Sowada v. Motzko, 256 Minn. 395, 399–400, 98 N.W.2d 182, 185–86 (1959) (examining whether a second act superseded a previous act to determine whether the first act was proximate cause).

223.Sowada, 256 Minn. at 399–400, 98 N.W.2d at 185–86.


225.As the court notes, Minnesota law on proximate cause simply asks whether the alleged act is a "substantial factor" in causing the harm. Frederick, 907 N.W.2d at 179–180. The substantial factor framework has been criticized for being misunderstood by courts and was abandoned by the Third Restatement. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 190 (8th ed. 2017) (quoting John Crane, Inc. v. Jones, 604 S.E.2d 822 (Ga. 2004) ("[T]here is danger that it will be used . . . to describe a general approach to the legal cause issue."); see also RESTATEMENT (THIRD) OF TORTS: LIMITATIONS ON LIABILITY FOR TORTIOUS CONDUCT § 29 cmt. a (AM. LAW. INST., 2010) (abandoning the "substantial factor" framework for the purpose of "limiting liability with greater precision."). Indeed, the majority's analysis of proximate cause using the substantial factor test resolves in a conclusory manner containing no analysis. Frederick, 907 N.W.2d at 180. While procedure does not require an in-depth analysis...
D. A Second Alternative: Duty

1. Duty vs. Breach

Transactional attorneys seeking to avoid committing malpractice may wonder whether Wallerich had a "duty" to check her work on the antenuptial agreement when she drafted the will and before she met with Frederick in September 2007. Answering this question in the affirmative would help attorneys understand what tasks are required of them when they serve return clients. Despite the amicus MSBA's urging, however, the court did not frame this case as an issue of duty.

Importantly, the court rejected Frederick's theory of duty. First, the court rejected Frederick's argument that attorneys have a duty to examine (or reexamine) the facts and research the law each time they render legal advice to a regular client. Though the court briefly discussed Frederick's second "duty" theory (the "second attorney" rule), it declined to analyze its merit because the court had already concluded that Frederick had a separate claim for legal malpractice.

While the Frederick decision showed just how easy it is to get sued for legal malpractice, the court did not explain why lawyers are

by the court at the pleading stage, a better analysis of proximate cause may help limit liability at this stage without the need for factors.

226. MSBA Brief, supra note 170, at *11 (arguing that a separate duty is a "prerequisite" to bringing a separate claim).

227. Frederick, 907 N.W.2d at 177: [L]awyers must be afforded adequate discretion to make judgment calls when clients seek to revisit previously completed projects. Lawyers must, based on context, discern whether the client simply wants reassurance that the project was completed, a reminder of the outcome, assurance that the outcome was favorable, or additional legal research on the question .... Frederick's rule is too broad because it assumes that every client, in revisiting previous work, prefers the last option: to have the attorney conduct new research and analysis every time a client asks a question.

228. Id. at 177, n.6: Frederick also proposes that we adopt a 'second lawyer' rule. Frederick argues that if he had retained a different lawyer for his will drafting, the second lawyer would be subject to a malpractice claim for failing to inform him that the antenuptial agreement was invalid, and therefore, Wallerich, too, is automatically subject to malpractice liability.

229. Id. ("Because we conclude that Frederick has sufficiently alleged a claim for legal malpractice against Wallerich, it is unnecessary to analyze the merits of this proposal.")
easily exposed to such suits. To clarify the law, the court should have explained that whether Wallerich reviewed her prior work for validity was not a question of duty, but of breach, an issue of fact usually decided at trial.\textsuperscript{230}

The duty element of legal malpractice is satisfied if there is an attorney-client relationship.\textsuperscript{231} The Frederick court determined that Wallerich and Frederick had an attorney-client relationship in 2007.\textsuperscript{232} Thus, Wallerich owed Frederick a duty to exercise the standard of care of a reasonable attorney under the same or similar circumstances.

The “duty” test under the attorney-client relationship relieves attorneys of liability to nonclients\textsuperscript{233} for purely economic losses.\textsuperscript{234} The test does not determine whether and when attorneys incur specific duties, such as the duty to review prior work—rarely does tort law impose duties to take (or not take) a specific action. Rather, duty is better characterized as a gateway to liability—a relationship or a set of circumstances that triggers the possibility of liability, depending on the alleged tortfeasor’s conduct.\textsuperscript{235}

\begin{itemize}
\item \textsuperscript{230}Dobbs, \textit{supra} note 5, § 719 (“While the existence of a duty is a question of law for the court, a number of courts leave it to the jury to resolve any contested issues of fact on this issue.”).
\item \textsuperscript{231}Id.
\item \textsuperscript{232}Frederick, 907 N.W.2d at 173 (“It is undisputed that the facts alleged in this case satisfy the first element of a legal-malpractice claim, the existence of an attorney-client relationship. At issue are the remaining elements: whether negligent acts exist that were the proximate and but-for cause of Frederick’s damages.”).
\item \textsuperscript{233}See Togstad v. Vesely, 291 N.W.2d 686, 692 (Minn. 1980); \textit{Restatement (Third) of the Law Governing Lawyer, supra} note 33, § 14 (citing situations where the attorney-client relationship is often at issue, such as whether an attorney represents trustees to an estate, employees of a client organization, or an insured person when the attorney defending a medical malpractice action is hired by the insurance company).
\item \textsuperscript{234}Dobbs, \textit{supra} note 5, § 718. For physical or emotional harm, everyone owes everyone else a duty of reasonable care to avoid that harm, but when alleged harm is purely economic, there must be special circumstances such as a special relationship.
\item \textsuperscript{235}See Christy v. Saliterman, 288 Minn. 144, 150, 179 N.W.2d 288, 294 (1970) (“Once it has been established that the relationship of attorney and client exists and that plaintiff has sustained damages by reason of the attorney’s negligence or breach of contract, the right to recover is established.”). \textit{See generally Dobbs, supra} note 5, § 258.
\end{itemize}
In legal malpractice, breach is specific conduct that falls beneath the standard of care generally owed to the client.\textsuperscript{236} In this case, the breach at issue could be either the 2007 drafting of the will or the alleged assurances that the antenuptial agreement was still valid. To determine whether an attorney breached a duty owed to a client, one must examine how a reasonable attorney would have acted under the same or similar circumstances.\textsuperscript{237} This typically involves hiring experts in the form of other attorneys to testify as to what they would have done.\textsuperscript{238}

In Frederick v. Wallerich, Frederick would have had to produce an expert to testify that he or she would have reviewed the antenuptial agreement in order to show that Wallerich should have reexamined the antenuptial agreement before drafting the will. To counter, Wallerich could have brought in an expert to testify that he or she would not have reviewed the antenuptial agreement. The jury would then decide which course of action sounded more reasonable. If the jury determined Wallerich acted unreasonably, then she was negligent.\textsuperscript{239} Luckily for Wallerich, any expert testimony against her might be countered by the fact that a substantial portion of the local legal community has expressed support for her course of action.\textsuperscript{240}

2. The “Scope of Engagement” Approach to Duty

The MSBA argued that Wallerich owed Frederick \textit{certain} duties throughout the course of their attorney-client relationship,\textsuperscript{241} and that these duties are determined by the scope of the engagement, or the

\textsuperscript{236}\textit{Dobbs, supra} note 5, § 719.

\textsuperscript{237}\textit{Id.} Though the court does not address the merits of Frederick’s “second attorney” test, \textit{Frederick} at 186 n.6, the test should fail because it changes the circumstances too drastically.

\textsuperscript{238}\textit{Togstad}, 291 N.W.2d at 692:

John McNulty, a Minneapolis attorney, and Charles Hvass testified as experts on behalf of the defendants.... [McNulty] testified, however, that when a lawyer is asked his legal opinion on the merits of a medical malpractice claim, community standards require that the attorney check hospital records and consult with an expert before rendering his opinion. \textit{Id.; Dobbs, supra} note 5, § 719.

\textsuperscript{239}Importantly, this does not mean she is liable—causation and damages must still be proven.

\textsuperscript{240}MSBA Brief, \textit{supra} note 170, AAML Brief, \textit{supra} note 171, PLDF Brief, \textit{supra} note 172.

\textsuperscript{241}MSBA Brief, \textit{supra} note 170, at *11.
specific duties outlined in the retainer agreement between the parties. This approach is consistent with fundamental principles of contract law: people may agree to organize their relationships with one another to make them more predictable, thereby encouraging business transactions and projects involving multiple independent parties. With this approach, parties may incur and impose duties to take or not take particular actions, standing in contrast to the general duty of care imposed by tort law, which may require or prohibit actions depending on the circumstances. Nevertheless, such an approach would not likely cause a malpractice claim to be dismissed on summary judgment because it does not comport with the general nature of duty in legal malpractice.

Attorneys are generally free to limit the scope of engagement with a client as long as the client is sufficiently informed. A client is sufficiently informed if the client knows not to rely on the attorney to take a particular action or be generally responsible for a certain matter. With this knowledge, the client may take steps to address that matter personally or with another professional. Here, had Frederick known that Wallerich never planned to meaningfully review the antenuptial agreement, he could have specifically asked her, or another attorney, to do so. Conversely, if Wallerich had specifically disclaimed this task in writing, Frederick could not effectively argue that he reasonably believed she would review the antenuptial agreement in a meaningful way.

One limitation on the scope-of-engagement approach is that the two parties, attorney and client, are on unequal footing as contracting parties. Because the client is not trained in the law, the client may not

242. Id.
243. Subha Narasimhan, Relationship or Boundary? Handling Successive Contracts, 77 Calif. L. Rev. 1077, 1101 (1989) ("Parties are better left to their own device . . . parties will devise strategies of cooperation, bonding, and reputational constraints on their own in order to minimize opportunism.").
246. See infra Part IV.D.3.
understand portions of the retainer agreement or know exactly what to expect based on its terms. Moreover, the client’s reasonable interpretation of the contract will control in court. Therefore, a scope-of-engagement agreement is only as good as the client’s reasonable interpretation of it. Applying the facts of the case, Frederick would allege that based on their agreement, he reasonably expected Wallerich to meaningfully review the antenuptial agreement in 2007. To determine whether this was reasonable, a lay jury would decide whether they, too, would have expected Wallerich to meaningfully review the agreement based on their own interpretation of the agreement.

3. The “Frederick Letter”

Transactional attorneys, their firms, and their insurance companies may be wise to draft a customizable “Frederick Letter,” or a type of continuing engagement letter for returning clients. Such a letter would aim to clarify expectations and avoid misunderstandings between attorney and client, ultimately reducing malpractice exposure. The letter would make clear which issues or attorney work products were revisited in a meaningful way and which ones were left alone. The letter could explain that the attorney stands by their prior work and proceeds as if it is valid, but because the law is subject to change, the attorney makes no claim as to its current validity unless the client and attorney expressly agree that the attorney should revisit the matter. The letter may invite the client to request a reevaluation.

A “Frederick Letter” would probably have the effect of reducing the number of malpractice suits filed because it would improve attorney-client communication. But it would not likely get a malpractice action dismissed in the event a client sues anyway. In contrast to the “Togstad Letter,” or non-engagement letter, disclaiming certain tasks does not negate an element of malpractice.

247 Id.
248 ATTORNEY-CLIENT AGREEMENTS TOOLKIT, supra note 16, at 10 (citing cases); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, supra note 33, at § 18(2) cmt. c (“A tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it.”); Id. § 31 cmt. h (“[T]he client’s reasonable understanding of the scope of the representation controls.”).
249 ATTORNEY-CLIENT AGREEMENTS TOOLKIT, supra note 16, at 2 (“Approximately 75% of all grievances filed against lawyers are the result of poor communication.”).
A non-engagement letter negates an attorney-client relationship, the existence of which fully satisfies the duty element of legal malpractice. A non-engagement letter, therefore, would likely help a defendant attorney convince a court to dismiss a malpractice suit. A “Frederick Letter,” on the other hand, cannot negate the relationship; it merely provides evidence of what specific tasks the attorney undertook to perform and what the client reasonably understood. Because a client’s reasonable understanding is a fact issue for a jury, unless reasonable minds could not differ, a malpractice case will likely proceed to trial despite the existence of a “Frederick Letter.”

Nevertheless, client communication is always prudent. Setting clear expectations and fostering mutual understanding is good client service. Furthermore, ethical rules require client communication. And of course, it may help avoid a lawsuit before it is filed. If the client understands the scope of an attorney’s undertaking, that client will be less likely to sue on the basis of an action the client knows to be outside of the scope. Furthermore, should a malpractice case proceed to trial, the Frederick Letter may help an attorney escape liability.

250. See, e.g., Hashemi v. Shack, 609 F. Supp. 391, 394 (S.D.N.Y. 1984) (holding that an attorney-client relationship did not exist, based solely on two written documents communicating to the client that the firm was awaiting authorization).

251. See, e.g., Christy v. Saliterman, 288 Minn. 144, 150, 179 N.W.2d 288, 294 (1970) (“Once it has been established that the relationship of attorney and client exists and that plaintiff has sustained damages by reason of the attorney’s negligence or breach of contract, the right to recover is established.”); Dobbs, supra note 5, § 719 (“[W]ithout a client-lawyer relationship, there is rarely a duty, and without a duty, there can be no malpractice liability.”).

252. Dobbs, supra note 5, § 719.

253. Cf. ATTORNEY-CLIENT AGREEMENTS TOOLKIT, supra note 16, at 15 (“The Disengagement letter provides an opportunity to enhance client relations. Use this final opportunity to express gratitude for the client’s business. If a favorable outcome was achieved, briefly remind the client of this fact. If desired, enclose a survey to evaluate and help enhance the quality of service provided by the firm.”); A.B.A., supra note 37 (quoting attorney Laurence J. Fox) (“The engagement letter and two types of disengagement letters...are critical...for creating the right atmosphere for a good lawyer-client relationship.”).

254. MINN. R. PROF. CONDUCT 1.4 (discussing professional responsibilities pertaining to communication with clients).
E. Recommendations

In addition to non-engagement and initial engagement letters, transactional attorneys serving return clients should send their clients letters on an ongoing basis specifying what tasks have been performed and clarifying that no other work was requested or performed. The letter could also state: “[Attorney and/or law firm] makes no guarantee as to the continuing validity of attorney-drafted documents or previously provided legal advice. If you have concerns about a legal issue [I and/or the firm] has worked on in the past, [I and/or the firm] would be happy to revisit the issue upon request. Additional fees may be charged to fulfill such a request.” For evidentiary purposes, this communication should be in writing, and attorneys and their firms should keep a copy of the letter on file.

Attorneys should be aware that any oral or written reassurance regarding prior work may constitute legal advice, and of course, that legal advice given negligently constitutes malpractice. Transactional attorneys should be concerned about this issue in any interaction with returning clients, but especially when assets associated with a prior transaction are subject to appreciation and when the two legal projects both relate, even if independently, to those assets. Further, attorneys should avoid cross-referencing documents unless absolutely necessary to comply with the law or the client’s intent, in order to avoid an interpretation that damages resulting from one defective document are related to another.

V. Conclusion

Frederick v. Wallerich addressed the issue of whether and when a client can allege multiple acts of legal malpractice for purposes of separate claims with separately-accruing statutes of limitation. The court ruled that Frederick’s two claims were sufficiently separate because (1) the second act “significantly worsened” Frederick’s position, (2) the two acts were of “different types,” (3) the two acts occurred at different times and during different transactions, (4) the second act did not flow causally from the first, and (5) the second act relied explicitly on the prior work. In doing so, the court let more

255. See discussion supra Part IV.B.2.a.
256. See discussion supra Part IV.B.2.b.
258. Id. at 174–75.
malpractice claims through the door to the jury without providing clear guidance as to how transactional attorneys should seek to avoid this result.

Courts and attorneys confronted with the multi-factor framework will likely encounter difficulty with its application and its reasoning. To avoid malpractice exposure, attorneys and law firms are advised to ramp up client communication to clarify expectations. Attorneys must also be wary of assurances and cross references when serving returning clients.
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