THE DOWN SIDE OF OPTIMISM: ATTORNEY LIABILITY FOR PROMISING SPECIFIC RESULTS

I. INTRODUCTION

In communications with their clients, many attorneys try to generate a certain aura of positivism and self-confidence, and quite often this affected attitude carries over to representations that are made about the resolution of legal problems. Whatever the nature of a given problem, whether trial work or nonlitigious services are involved, it is undeniably to the attorney's advantage to predict the most favorable outcome possible under the circumstances. Such a practice not only buttresses the efficacy of the attorney's professional persona, but also provides some degree of comfort for the client, who is typically upset, nervous, or, at the very least, a bit overawed by all of the legal intricacies that the attorney is expected to deal with. Of course, attorneys should never get so caught up in these intangible and somewhat tangential concerns that they lose sight of the fiduciary underpinnings of the attorney-client relationship and begin to make misrepresentations about what they can accomplish. For one thing, if a lawyer negligently or intentionally "paints a brighter picture" than is warranted by the facts of a particular client's situation, there is arguably a breach of the Model Rules of Professional Conduct, which provide that "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."1 Also, along somewhat different lines, a relatively innocent comment like, "Don't worry, the judge has known me for years, respects my work and almost always rules in my favor" could run afoul of another provision of the Model Rules which states that "It is professional misconduct for a lawyer to . . . state or imply an ability to influence improperly a government agency or official."2 Oddly enough, however, there is only a small minority of American jurisdictions3 in which a client can

3. Here I refer to Alaska, Georgia, Louisiana, New York and the Virgin Islands. The nature of the liability imposed in each of these jurisdictions is discussed below.
bring suit against his or her attorney for promising a specific result that is not subsequently fulfilled, and in those jurisdictions, disgruntled clients have historically had access to only one theory of recovery—breach of contract.

At present, the vast majority of legal malpractice suits are handled as negligence actions, given that the plaintiff is typically accusing the attorney of breaching his or her professional duty in some manner. The application of breach of contract theory may therefore seem a bit puzzling in situations where the attorney has promised a specific result and subsequently failed to effect that result. Nevertheless, a number of possible explanations for this deviation suggest themselves. For one thing, the issues raised by promises and the breach thereof fit rather naturally into the principles of contract law. Also, the use of these principles in legal malpractice litigation is by no means foreign to American jurisprudence. Many of the earliest legal malpractice cases concerned attorneys who had failed to collect notes after formalizing such undertakings within written contacts with their clients. Finally, since the statute of limitations that attaches to breach of contract actions is typically much longer than the statute of limitations that attaches to tort actions, one might infer that courts ruling upon the question of breached attorney promises have taken a contract law approach in order to provide greater deterrence for a form of misconduct they consider particularly reprehensible and injurious.

As previously mentioned, the precedential history for this kind of liability is sparse in the United States, a phenomenon which Ronald E. Mallen and Jeffrey M. Smith recognize and briefly attempt to explain in their text on legal malpractice: “Relatively few modern actions against attorneys are for breach of an express or written contract. Although the subject matter of the representation and the fee arrangement are common contractual terms, seldom do attorneys guarantee or promise a specific result.” Admittedly, the true picture may not be quite so rosy, and such promises are perhaps made much more frequently than Mallen and Smith suggest, but this does not change the fact that most American lawyers live in jurisdictions that have developed no pertinent case law, nascent or otherwise. Even they, however, should work diligently to further the best interests of both themselves and their clients by setting personal standards of accountability and taking certain precautions when discussing the


5. Id. at 415.
results that their services can produce. Before briefly returning to these concerns in conclusion, this Article will examine the specific contours of the liability imposed in respective American jurisdictions.

II. SANTULLI v. ENGLE, REILLY & MCHUGH, P.C.\(^6\) AND THE EVOLUTION OF LIABILITY IN NEW YORK

As recently as 1994, in the case of Schimenti v. Whitman & Ransom,\(^7\) the State of New York reiterated a position that it has taken for the past four decades,\(^8\) namely, that attorneys can be sued for breach of contract when they fail to produce certain results for their clients. The attorney in Schimenti, who had represented a subordinate lienor in a number of mortgage foreclosure proceedings, was not held liable for failing to investigate the alleged fraud and collusion of the borrower and the senior lienor bank, but the court was careful to note that the absence of an expressly promised result on the attorney’s part—either a promise that he would make investigations or a promise that the plaintiff would prevail—was not controlling.\(^9\) Pointing out a new spin given to the issue of attorney liability by Santulli v. Englert, Reilly & McHugh, P.C.,\(^10\) the court stated that “[w]hile an action for breach of contract may be based upon the breach of an implied duty of care, even in the absence of an express promise by the attorney to obtain a specific result . . . here the facts adduced [do not] support . . . the contract claim.”\(^11\) By thus imposing an implied duty of care upon attorneys so that liability can attach when they fail to obtain particular types of unpromised results, New York has gone much farther than most of the handful of other jurisdictions that have adjudicated such matters, a fact not altogether surprising given the relatively long and variegated history of that state’s precedents in this area.

Almost forty years before Santulli, in Glens Falls Ins. Co. v.

\(^8\) Apparently, the earliest New York case imposing liability in this area was Glens Falls Ins. Co. v. Reynolds, 159 N.Y.S.2d 95 (N.Y. App. Div. 1957), which is discussed in some detail below.
\(^9\) See Schimenti, 617 N.Y.S.2d at 743.
\(^10\) 586 N.E.2d 1014.
\(^11\) Schimenti, 617 N.Y.S.2d at 743 (emphasis added).
Reynolds, a third-party plaintiff sued the attorney it had professionally retained, stating two causes of action—negligence in performance of professional service and breach of specific contract. The Appellate Division of the New York Supreme Court set an important precedent by holding that, given the right facts, breach of contract could indeed be found:

Carelessness resulting in professional miscarriage, in the absence of agreement to obtain a specific result or to assure against miscarriage, would usually be governed by the three-year statute of limitations for negligence . . . . But if there was an agreement to obtain a specific result, or to assure the effect of the legal services rendered, the six-year statute of limitations in contract may apply . . . . Decision on which is the appropriate statute of limitations [in this case] should await a plenary examination of the facts relating to the nature of the professional undertaking by the third-party defendant.

To support its creation of a breach of contract theory in the attorney-client context, the court relied upon an earlier decision in which the New York Court of Appeals had applied a similar theory to impose liability upon a physician who failed to effect the specific remedy he had promised his patient.

For the next twenty years or so, no case arose in New York to test the viability of Glens Falls, but then, in Boecher v. Borth, a client brought an action for breach of contract against an attorney who had promised him the specific result of establishing the marketability of his title. Although the attorney assured the client that his title was fully marketable, five years later, when the client sold his property, the purchaser’s attorneys required him to obtain a quitclaim deed to a remainder interest that neither he nor his attorney knew anything about. Holding that the appropriate cause of action was legal malpractice—essentially a negligence claim with a three-year statute of limitations—the trial court dismissed the complaint, but the Appellate Division, relying upon Glen Falls, reversed: “Upon an examination of the submit-

13. See id.
14. Id. at 97 (emphasis added).
17. See id.
18. See id. at 782.
ted facts, under the terms of the retainer agreement, there was an express promise by defendant to achieve the specific result of establishing marketability . . . . Under these . . . stipulated facts . . . the six-year Statute of Limitations applies."

The next significant case to arise was Brainard v. Brown,\(^{20}\) in which a client sued his attorney for failing to properly draft a security agreement.\(^{21}\) Since the suit was commenced four years after the completion of the instrument in question, the client tried to rely upon a contract-based theory of recovery, but the Appellate Division reached a result different from Boecher, finding instead that legal malpractice, with its three-year statute of limitations, was the appropriate cause of action:

That the gravamen of plaintiff's suit is negligence is abundantly clear from the amended verified complaint itself where . . . it is specifically charged that "an attorney of reasonable skill and diligence would have drafted the Security Agreement in another form." Considerable importance must also be attached to the fact that defendant's services were furnished pursuant to a general oral retainer agreement and that plaintiff relies not on any particular provision of the agreement, but attempts instead to fashion a contract action out of the attorney's implied duty to use reasonable care to exercise his professional skill.\(^{22}\)

The client also argued that the attorney, in representing both him and the other party to the security agreement, had maintained a conflict of interests in violation of the Code of Professional Responsibility and that such a violation gave rise to a breach of contract, but the court dismissed the logic of this argument, stating that "[a] purported violation of a disciplinary rule does not, in itself, generate a cause of action."\(^{23}\)

Only months after Brainard, the Appellate Division reached a similar result in Albany Sav. Bank v. Caffey & Judge, P.C.,\(^{24}\) a case with a fact pattern almost identical to the one in Boecher. Like the attorney found liable in Boecher, the attorney here, after doing a title search for his client, mistakenly asserted that the property involved was free of any

\(^{19}\) Id. at 783.


\(^{21}\) See id.

\(^{22}\) Id. at 736 (emphasis added).

\(^{23}\) Id.

liens, encumbrances or defects that would diminish its marketability.\textsuperscript{25} Significantly, however, he had not promised his client beforehand that he would establish the marketability of the title, so the court dismissed the client’s claim for breach of contract, holding that the attorney was only guilty of legal malpractice:

The pivotal issue is whether the defendant expressly agreed to accomplish a specific result . . . . In its brief, plaintiff acknowledges that ‘defendant did not make an oral or written promise to obtain a specific result’ but urges the court to imply such an agreement from the continuous course of dealings between the parties. We decline to so do.\textsuperscript{26}

In \textit{Krouner v. Koplovitz},\textsuperscript{27} the defendant attorneys were involved in a conflict of interests somewhat similar to the one in \textit{Brainard}, but once again, the Appellate Division found that such a conflict did not constitute a breach of contract merely because it violated an ethical code of professional conduct.\textsuperscript{28} Two years after the plaintiff hired the defendants to represent his engineering firm in its merger with an architectural firm, they provided legal services for certain members of the latter firm and advised them to terminate the plaintiff.\textsuperscript{29} Although these actions on the part of the attorneys were ethically questionable, as the court noted, “[t]he terms of the agreement are not set out, \textit{nor does the complaint allege that defendants promised plaintiff to achieve a specific result}. Consequently, the complaint fails to set out a breach of contract cause of action.”\textsuperscript{30}

\textit{Santulli} represents the first, and, at present, only precedent provided by the Court of Appeals of New York relating to breached promises between attorneys and their clients. After retaining a law firm to represent him in the sale of his hardware business, the plaintiff in \textit{Santulli} discovered that only one-half of the vendee’s real property was encumbered by the mortgage agreement the defendants had drafted.\textsuperscript{31} Even though the defendants had made no specific promises with regard to the mortgage, the court imposed liability for breach of contract, thereby abrogating the

\begin{flushleft}
\textsuperscript{25} \textit{See id.}.
\textsuperscript{26} \textit{Id.} at 897.
\textsuperscript{28} \textit{See id.} at 960.
\textsuperscript{29} \textit{See id.}
\textsuperscript{30} \textit{Id.} at 962 (emphasis added).
\end{flushleft}
most fundamental tenet of *Glens Falls*, and all of the Appellate Division decisions which had followed it. In the court’s opinion

> [a] cause of action for breach of contract may be based on an implied promise to exercise due care in performing the services required by the contract . . . . Here, the complaint alleges that defendant ‘agreed to do all services relative to the sale of plaintiff’s hardware business, including the preparation of the first mortgage’ . . . . [V]iewing the complaint as a whole, we conclude that a cause of action for breach of contract was adequately stated.\(^{32}\)

Giving a brief retrospective look at contrary Appellate Division holdings, the court found particular fault with *Brainard* and *Albany Sav. Bank*, questioning the soundness and continued viability of both decisions.\(^{33}\)

### III. The Development of the “Non-Delictual” Legal Malpractice Action in Louisiana

After New York, no state currently has a richer precedential history concerning attorneys who have promised specific results to their clients than Louisiana. Decided in 1983 and separated from *Glens Falls* by almost three decades, the first such Louisiana precedent, *Cherokee Restaurant, Inc. v. Pierson*,\(^{34}\) involved an attorney who was sued by his client for drafting a defective lease. Attempting to follow the client’s request “to draft the longest lease allowed by law,”\(^{35}\) the attorney produced one purporting to grant “an infinite number of annual options to renew this lease for additional periods of one year each.”\(^{36}\) At the time the client brought suit against the attorney for this drafting error, legal malpractice actions in Louisiana were uniformly treated as delictual, or tortious, in nature, and the one-year statute of limitations attached to such actions had already run.\(^{37}\) If the error could somehow be typified as a breach of contract, however, a ten-year statutory period would attach, and the action could be sustained. Like the court in *Glens Falls*, the Court of Appeal of Louisiana, First Circuit, pursued its analysis by using an earlier medical

\(^{32}\) *Id.* (emphasis added).

\(^{33}\) *Id.*

\(^{34}\) 428 So. 2d 995 (La. Ct. App. 1983).

\(^{35}\) *Id.* at 996.

\(^{36}\) *Id.*

\(^{37}\) See *id.*
malpractice case as an analogue:

Conceptually, the action for legal malpractice is no different than the action for medical malpractice. Both entail a deviation from the accepted standard of care of the profession. Although the attorney-client relationship gives rise to an implied warranty of the attorney to use his best professional skill and judgment, this duty is legal rather than contractual in nature, and a breach of this duty amounts to a tort. However, when an attorney expressly warrants a particular result, i.e., guarantees winning a lawsuit, guarantees title to property, guarantees or warrants the ultimate legal effect of his work product, or agrees to perform certain work and does nothing whatsoever, then clearly there would be an action in contract.

After creating a “non-delictual” legal malpractice action, however, the court found no basis for such an action within the facts before it, contending that “[w]hen Pierson [the attorney] agreed to prepare a lease with the longest term allowed by law, this necessarily entailed the use of his judgment, a decisional process, and the formulation of his opinion. As such, a specific result was envisioned but not guaranteed.”

In Knighten v. Knighten, a case decided less than a year after Cherokee Restaurant, a curatrix who was being sued by the legally-separated wife of her ward brought a third-party demand for malpractice against her former attorney, arguing that he should have advised her to obtain a divorce for the ward, thereby severing the community between the ward and the plaintiff. As in Cherokee Restaurant, the one-year statutory period relating to delictable claims has already elapsed, so the demand could only be sustained if a breach of contract were found. In ruling against the curatrix, the Court of Appeal for the Second Circuit cited Cherokee Restaurant favorably and emulated the First Circuit’s analysis:

The cause of action in the instant case is clearly in tort. The claim in essence is that Lain [the attorney] negligently gave the curatrix bad advice. The curatrix . . . hired Lain to secure for her the appointment of curatrix . . . . Lain did not warrant any particular result . . . and he

39. Cherokee Restaurant, 428 So. 2d at 998, 999 (emphasis added).
40. Id. at 999.
42. See id. at 535.
43. See id.
did the work he was hired for.\textsuperscript{44}

In 1985, in the case of \textit{Elzy v. ABC Insurance Co.},\textsuperscript{45} the Court of Appeals for the Fourth Circuit refused to hold an attorney liable for breach of contract in the absence of "warranted results," citing no precedent but applying, at least implicitly, the analysis of \textit{Cherokee Restaurant} and \textit{Knighiten}. Before failing to file his client's personal injury claim in a timely fashion, the attorney in question had not only made certain oral promises to the client, but had also entered into a contingent fee agreement with him. The court, however, found neither of these things to be availing for the client:

Plaintiff's deposition does not support . . . an allegation [of "warranted results"], for it speaks only of a promise that "doctor bills and stuff like that . . . would be taken care of the rest of my life . . . would be taken care of by insurance, you know"—presumably, at least in part, a reference to worker's compensation benefits and hardly the language of a warranty of results in a related tort suit . . . . Moreover, the parties' having entered a written contingent fee contract is itself inconsistent with their having entered a "warranted results" contract, whatever declaration of expectations the lawyer may have made.\textsuperscript{46}

In deciding here that the existence of the contingent fee arrangement was actually a stumbling block in the client's breach of contract claim, the court seemed to create a significant loophole for plaintiffs' attorneys, giving them license to make almost any promise without fear of facing contractual damages.

Following \textit{Elzy}, only two other Louisiana state court cases on point, \textit{Gifford v. New England Reinsurance Corp.}\textsuperscript{47} and \textit{Newsom v. Boothe}\textsuperscript{48} were decided during the 1980s, both by the Court of Appeal for the Second Circuit. In \textit{Gifford}, an attorney who had handled the loan closing on a home without taking precautions to protect his clients from the risk of liens was held to be negligent, but since he had promised the clients no specific results, no action for breach of contract was found.\textsuperscript{49} In \textit{Newsom}, a wife who would have received substantial bequests from her

\textsuperscript{44} Id. at 536.
\textsuperscript{45} 472 So. 2d 205 (La. Ct. App. 1985).
\textsuperscript{46} Id. at 207.
\textsuperscript{47} 488 So. 2d 736 (La. Ct. App. 1986).
\textsuperscript{48} 524 So. 2d 923 (La. Ct. App. 1988).
\textsuperscript{49} See 488 So. 2d at 736.
husband’s will sued the family attorney for his failure to make certain that the will was properly signed.50 Once again, however, the court ruled that no breach of contract could be found since the attorney had not expressly promised a specific result:

Mr. Boothe [the attorney] apparently represented to Mr. and Mrs. Newsom [the clients] that the statutory will would effectuate his testamentary wishes, but an implied duty of legal competence is present in every attorney-client relationship and is not sufficient, without evidence of a warranty to achieve a specified result, to activate the contractual prescription.51

Prior to 1992, the Supreme Court of Louisiana did not express any opinion about the “non-delictual” legal malpractice action that the lower courts had created. Then, in Lima v. Schmidt,52 a case involving intricate statute of limitations questions, the court recognized the validity of such an action, stating that,

As a general rule, an action for legal malpractice is a delictual action governed by the one-year prescription of LSA-C.C. Art. 3492 . . . . While this rule is subject to certain limited exceptions, an examination of the pleadings filed in this case reveals that the parties do not dispute that this action is governed by the one-year period.53

In a footnote to this language, the court carefully delineated the exceptions: “(1) when the attorney expressly warrants a specific result and fails to obtain it, and (2) when the attorney agrees to perform certain work and does nothing whatsoever. In these two contexts, the action is in contract and subject to the ten-year prescriptive period provided by LSA-C.C. Art. 3499.”54 As support for this, the court cited only to Gifford, something apparently done for convenience’s sake, in that all the other cases on point were collected within that particular case.

In addition to Lima, another event, perhaps even more significant, took place in Louisiana law in 1992—the statutes governing legal malpractice were rewritten so that all such actions from that point forward, both delictual and “non-delictual,” would have to be filed within one year from the date that the alleged act, omission, or ne-

50. See 524 So. 2d at 923.
51. Id. at 92.
52. 595 So. 2d 624 (La. 1992).
53. Id. at 628.
54. Id. at n.2.
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Neglect is discovered or should have been discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.\textsuperscript{55}

This change was retroactive, but any "alleged act, omission, or neglect" which had occurred prior to September 7, 1990, could be filed on or before September 7, 1993, provided that the statute of limitations which would have formerly governed the claim had not yet expired.\textsuperscript{56}

Since the marked disparity that once existed between the statutes of limitations governing delictual and "non-delictual" actions has evaporated in Louisiana, the number of breach of contract claims brought by disgruntled clients has understandably dwindled to almost zero, but the transitional effects of the above-mentioned legislation gave rise to three cases on point, all decided in 1995. The first, \textit{Vaughn v. Slaughter},\textsuperscript{57} involved a client whose corporation was denied Subchapter S status as a result of his attorney's failure to mail in the requisite forms to the IRS.\textsuperscript{58} Finding that the attorney had not promised the client any specific result with regard to either the preparation or mailing of the forms, the Court of Appeal for the Second Circuit held the action to be delictual and unsustainable, in that the one-year statutory period had lapsed before September 7, 1993.\textsuperscript{59} Two months later, the Second Circuit reached the same holding in \textit{Lynn v. Brown, Williams & Tuckers},\textsuperscript{60} a case that, like \textit{Elzy}, was brought due to an attorney's failure to file his client's tort claim in a timely fashion.\textsuperscript{61} Once again, the absence of an express promise to obtain a specific result was controlling. In the third case, \textit{Bell v. Ott},\textsuperscript{62} the Court of Appeal for the Fourth Circuit reached a similar result where a law firm, during its involvement in a community property settlement, failed to effect the cancellation of liens against the family home but had not expressly promised its client to do so.\textsuperscript{63}

\textsuperscript{56} See \textit{id}.
\textsuperscript{57} 653 So. 2d 36 (La. Ct. App. 1995).
\textsuperscript{58} See \textit{id}.
\textsuperscript{59} See \textit{id.} at 37.
\textsuperscript{60} 655 So. 2d 675 (La. Ct. App. 1995).
\textsuperscript{61} See \textit{id}.
\textsuperscript{63} See \textit{id}.
IV. LIABILITY IN JURISDICTIONS WITH MINIMAL PRECEDENT

No American jurisdiction other than New York and Louisiana that has considered the question of attorney liability for promising specific results has produced more than two precedents on point. The first of the two Alaska cases, Van Horn Lodge, Inc. v. White,\textsuperscript{64} involved a group of attorneys whose failure to file an amended complaint in a timely fashion resulted in sanctions being levied against their client.\textsuperscript{65} Applying an analytical strategy quite familiar by now, the Supreme Court of Alaska held in favor of the attorneys, refusing to typify the late filing as a breach of contract:

[Since] [t]here is no evidence of an agreement to obtain a particular result or to do a particular thing . . . . we believe the essence of Van Horn’s [the client’s] complaint was negligence, and the gravamen thereof lies in tort. Accordingly, the period of limitations found in AS 09.10.070 [two years], rather than AS.09.10.050 [six years], applies.\textsuperscript{66}

Nine years later, in the 1990 case of Jones v. Wadsworth,\textsuperscript{67} the court did find breach of contract where an attorney had failed to do two “particular things” that he had promised his client: (1) that he would “move the case through the court system to trial expeditiously,”\textsuperscript{68} and (2) that he would “keep . . . [the client] informed and up to date on all the happenings in court.”\textsuperscript{69} In the process of refuting the attorney’s argument that such a holding would “open the door to artful pleading, such that ‘every case involving professional malpractice would become a contract case,’”\textsuperscript{70} the court seemed to cast doubts upon the precedential value of Van Horn:

[T]he prospect of “every” attorney malpractice case being governed by the contract statute of limitations is not necessarily undesirable. Under our current approach, the court must determine whether such an action is based on the breach of an express contractual duty or merely an implied one. As an original proposition this would seem to be a needless exercise since the six-year statute applies to all contract

\textsuperscript{64} 627 P.2d 641 (Alaska 1981).
\textsuperscript{65} See id. at 642.
\textsuperscript{66} Id. at 643.
\textsuperscript{67} 791 P.2d 1013 (Alaska 1990).
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 1017.
liabilities, express or implied. We thus may question the validity of the Van Horn dichotomy between tort and implied contract duties on the one hand, and express contract duties on the other.\textsuperscript{71}

Clearly, this is a position very similar, if not identical, to the one taken by the Court of Appeals of New York in Santulli.

In Berman v. Rubin,\textsuperscript{72} a 1976 legal malpractice case which did not itself involve the promise of specific results, the Court of Appeals of Georgia stated in dicta that

Although he is not an insurer of the documents he drafts, the attorney may breach his duty towards his client when, after undertaking to accomplish a specific result, such as to approve a marketable title or draft a will, he then fails to comply with prescribed statutory formalities or fails to effectuate the intents of the party.\textsuperscript{73}

This reference to breach of a duty suggests a negligence approach to the problem, but seven years later, in Kushner v. McLarty,\textsuperscript{74} the court recast it in terms of contract law. After drafting a defective employment agreement for his client, the attorney in Kushner assured the client on several occasions “that the agreement said what he had intended.”\textsuperscript{75} After the defect in the contract came to light, the client brought suit under a breach of warranty claim, but the court held for the attorney:

To recover for an express warranty it is necessary to show that the statement was intended to be an express warranty and that it was relied upon as such. Our review of the transcript demonstrates that appellant’s evidence shows, at most, words of recommendation, not an enforceable contract of express warranty.\textsuperscript{76}

Prior to 1982, the Virgin Islands had no precedents which discussed the intrinsic nature of malpractice actions or the statute of limitations which should apply to them, but then, in the case of Ingvolstad v. Estate of Young,\textsuperscript{77} the District Court for the Division of St. Croix decided to use the foreign precedent of Van Horn as a starting point. The client bringing suit in Ingvolstad claimed that his deceased attorney had em-

\textsuperscript{71} Id.
\textsuperscript{72} 227 S.E.2d 802 (Ga. Ct. App. 1976).
\textsuperscript{73} Id. at 804.
\textsuperscript{74} 300 S.E.2d 531 (Ga. Ct. App. 1983).
\textsuperscript{75} Id. at 533.
\textsuperscript{76} Id. at 534.
\textsuperscript{77} 19 V.I. 115 (D.C.V.I. 1982).
ployed a variety of misrepresentations to trick him into signing several disadvantageous leases, and that this constituted, among other things, a breach of some vaguely-defined oral contract that he had initially formed with the decedent relating to the characteristics and scope of the envisioned attorney-client relationship. In holding against the client, the court stated that where "the pleadings do not allege a promise by the attorney to obtain a definite result or to assure against some professional miscarriage, the . . . action will be governed by the negligence statute of limitations." Notably, the second prong of this standard is much more lenient than the one in Van Horn, because instead of facing liability only for promising to do a "particular thing," attorneys under Ingvolstad also face liability when they make assurances against some form of legal malpractice. This standard was upheld almost ten years later by the same court in Phaire v. Galiber-Babb, a case where an attorney was accused of gross inefficiency and dereliction by her client. Despite factual findings which suggested that all of the allegations along these lines were true, the court refused to find a breach of contract action, given that the attorney had promised no definite results or given assurances against malpractice.

V. CONCLUSION

After reading through this overview of the potential liability that American attorneys have faced for failing to effect specific results allegedly promised to clients, one sees that a couple of the ideas expressed initially deserve special attention. For one thing, even if courts have not engaged in the hypothesized practice of applying contract principles to such liability in order to augment deterrent effect, it is important to note that most, if not all, of the cases discussed would have been dismissed summarily absent the longer statutory period. Typically, the statute of limitations for any sort of tortious claim had elapsed, making one wonder if the plaintiff and/or the court involved would have even bothered to focus overmuch upon the attorney's promises if this were not so.

Despite the advantages plaintiffs receive due to the longer statutory

78. Id.
79. Id. at 121.
81. See id.
82. See id. at 145.
period, their almost uniform lack of success seems to support another observation made early on, namely, the suggestion by Mallen and Smith that the vast majority of attorneys actually do refrain from promising specific results. It should be kept in mind, however, that such promises are usually claimed to be oral ones made in private. It is therefore impossible to know whether there are a lot of ethical, circumspect attorneys out there, or whether there are a lot of honest plaintiffs who suffer from onerous burdens of proof.

Whatever the case, truly ethical and circumspect attorneys should not base their conduct upon the general outcome of the litigation to date or the relative infrequency with which it has been brought. Indeed, as to the latter, no jurisdiction is an absolutely safe harbor, given that any court can potentially fashion a relevant cause of action from basic contract principles, or, more probably, import it from one of the few jurisdictions where one already exists. Although the aforementioned concerns about the attorney’s professional dignity and the client’s emotional equilibrium are not to be taken lightly, attorneys must work hard to find the right balance between foolhardy optimism and weakhearted pessimism. Clearly, if the results of representation are not projected in sufficiently provisional or hypothetical terms, even more fundamental threats to the attorney’s or the client’s wellbeing can arise.

\[\text{JD Honeycutt, III}\]