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Protecting consumer trust in attorneys: Handling the legal malpractice claim

Introduction

We are extraordinarily privileged to be practicing law. With that privilege comes the extraordinary responsibility of sustaining the integrity and competence of our profession. Consumer attorneys practicing in the area of legal malpractice strive to maintain the principles and standards of our organization and of the profession as a whole. One way they accomplish this is by obtaining compensation for clients whose prior counsel have not lived up to those goals.

Many, indeed most, cases of malpractice are brought when the lawyer goes beyond merely making a mistake. Usually, a client's motivation to sue a lawyer is based on distrust or disregard. These can arise from a blatant disregard of a client's material instructions, unreasonable billing, violation of the Rules of Professional Conduct, or attempting to conceal mistakes. An honest error in judgment – even if it falls below the standard of care – is rarely the impetus for a client to sue a lawyer.

This article will address how a consumer attorney should evaluate whether to take a legal malpractice case, the basic law surrounding litigation of the case, and the importance of consumer attorneys in rebuilding confidence in our profession through proper communication with the client.

Evaluating and accepting the case

The standard for determining the viability of a legal malpractice claim rests upon the "case-within-a-case" analysis, which applies both to litigation and transactional cases (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240 [135 Cal.Rptr.2d 629], citing *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820 [60 Cal.Rptr.2d 780]). This standard helps define the essential element of causation, which is discussed further below. In addition to evaluating the merits of the client's claim, legal malpractice lawyers should analyze four other critical areas before taking a case.

• *Has the statute of limitations run?*

A malpractice action must be commenced within one year after discovery of the facts constituting the negligent act or omission or four years from its occurrence, whichever occurs first (CCP § 340.6). As with most claims, the client cannot feign ignorance because the standard is when the client knew *or should have known* about the malpractice. Keep in mind, though, that the statute is tolled while the negligent lawyer continues representing the client on the same matter. (CCP § 340.6(a)(2)). For example, if the malpractice occurred and was discovered in January 2004, but the representation on the same matter continued until June 2004, the statute of limitations expires in June 2005. If the statute is about to run, and the malpractice attorney is unsure whether or not to take the case, a tolling agreement should be considered.

• *Waiver of the attorney-client privilege*

The client must understand that much of the communication between the client and the former lawyer will be waived once the malpractice suit is filed. This is a risk the client should evaluate carefully before deciding to proceed. If disclosing this attorney-client information may prove damaging to another pending case, the new attorney should consider obtaining an agreement tolling the legal malpractice case. Also, the negligent lawyer may have an in-depth understanding of the client, her litigation strategies, her settlement tendencies, and perhaps other *skeletons* in the closet. These may prove detrimental to the client and have implications beyond the potential legal malpractice action.

For parties represented by multiple firms, the waiver of the attorney-client privilege only applies to the attorney being sued. This ensures that the client maintains the privilege with the non-party firm. *(See Kroll & Tract v. Paris & Paris,* (1999) 72 Cal.App.4th 1537, 1544 [86 Cal.Rptr.2d 78] where the court held that the client holds the privilege and by choosing not to sue for malpractice, expressly preserves the privilege as to communications with that firm.)

• *Costs*

Financial viability is a major consideration in accepting these cases. Clients should be made aware of litigation costs, especially expert witness fees. Because the attorney handling a legal malpractice case must prove both the underlying case and the malpractice, multiple levels of experts are often necessary. One expert will establish the attorney's breach of the standard of care, while another will prove the underlying case. For example, in a legal malpractice claim arising from an underlying medical malpractice case, the client must often retain one or more medical experts to prove the underlying case, and an expert lawyer to analyze whether the former lawyer's actions were within the standard of care. The complexity of the underlying case thus often governs the number of experts required.

Before deciding whether to proceed, the attorney should discuss the client's expectations regarding damages versus the cost of going forward. Although it may be difficult to determine the actual value of the case prior to discovery, it is good practice for the attorney to understand the client's objectives before getting involved in litigation. In evaluating the case, it is also important to take into account expert opinions on damages.

• *Insurance*

Insurance may play a key role in handling a legal malpractice claim. Although this information is important in evaluating the collectibility of a claim, it may not be

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easy to obtain. Unless the prior lawyer's retainer agreement addresses coverage or the client knows this fact, it may not be possible to find out what coverage, if any, is available before discovery begins.

Because insurance may have an impact on litigation and strategy, the nature of the insurance policy should be determined early on. For instance, some policies have "burning limits," meaning there are limited funds available to litigate the case to conclusion. The funds available to pay any settlement or judgment are reduced progressively as the defendant's attorney's fees and litigation expenses are deducted from the policy.

One way to protect the client from insufficient insurance coverage is to make an early full policy demand. A well-reasoned and thoroughly documented policy limits demand during the initial stage of litigation can have two good outcomes. First, the case could settle without much litigation. Second, if the insurance carrier unreasonably turns down a valid policy limits demand, this act may "open up" the policy and subject the insurer to future excess liability.

Prosecuting the case

The elements of a cause of action for legal malpractice are: breach of the duty a lawyer has to the client; a causal connection between the breach and the resulting injury; and actual loss or damage resulting from the breach. *(Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1682 [19 Cal.Rptr.2d 601]; *see also*, *Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849]).

• *Attorney's duty*

Typically, duty is at issue only when there is a question about whether an attorney-client relationship existed. Where the attorney-client relationship exists, the attorney fulfills her duty to act within the standard of care by litigating the case or handling the matter in a manner consistent with the accepted professional standards in the community (*Smith v. Lewis* (1975) 13 Cal.3d 349, 356 [118 Cal.Rptr. 621]).

In legal specialization areas, the attorney may be judged according to the standards set by specialists practicing in the community. As a result, a specialist, such as a tax attorney, would be judged by a higher standard than a non-specialist (*Wright v. Williams* (1975) 47 Cal.App.3d 802 [121 Cal.Rptr 194]).

An attorney owes numerous duties to her client. Some worth highlighting include: fiduciary duty, duty to make informed decisions based on the law, and duty to follow client instructions.

Fiduciary duty: "Resolve to be honest at all events; and if in your own judgment you cannot be an a honest lawyer, resolve to be honest without being a lawyer."– Abraham Lincoln.

Breach of fiduciary duty may be pled as both a component of legal negligence and as a separate tort (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070 [41 Cal.Rptr.2d 768]). If pleading both, the malpractice attorney should allege separate facts to establish more than garden-variety negligence is asserting the breach of fiduciary duty cause of action.

Attorneys are bound by the most conscientious fidelity when undertaking a client's representation. This includes a duty of loyalty and utmost respect for the client's confidences. Conflicts of interest and failure to comply with the Rules of Professional Conduct may give rise to a claim of breach of fiduciary duty and result in a legal malpractice claim (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1044-1045 [117 Cal.Rptr.2d 685]).

Duty to make informed decisions: "The leading rule for the lawyer, as for the man of every other calling, is diligence."– Abraham Lincoln.

Attorneys are expected "to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem." (*Smith v. Lewis*, *supra*). Although attorneys do not ordinarily guarantee the soundness of their opinions, and are therefore not liable for every mistake they make, this duty ensures that they make informed decisions consistent with the law. Breach of this duty typically occurs when attorneys venture into unfamiliar areas of law.

Duty to follow client instructions: An attorney has a duty to follow the client's instructions except as to matters of detail in conducting the lawsuit. A lawyer that does not follow the client's instructions with reasonableness and care is liable for all resulting losses therefrom (*Lally v. Kuster* (1918) 177 Cal. 783, 786 [171 P.961]). In *Lally*, the attorney chose to delay rather than follow the client's instruction to expeditiously pursue her claims. Upon dismissal of the case for failure to prosecute, the court held the attorney liable for the losses caused by the attorney's failure to follow the client's instructions. (*Id.* at 787.)

• *Breach of duty*

A lawyer is negligent, *i.e.*, breaches the standard of care, when she fails to use the skill and care that a reasonably careful lawyer would have used under similar circumstances. Of course, reasonable errors under the circumstances are exempted and success is not required.

There are numerous types of breach. Some noteworthy examples include failing to perform the legal services contracted for competently, failing to provide all the legal services contracted and billed for, failing to provide competent legal advice, failing adequately to supervise attorneys and others under the attorney's direct supervision, failing to investigate an underlying case, failing to communicate essential matters concerning the representation to the client, and failing properly to pursue plaintiff's case once it was filed, or even to file it on time.

• *Causation*

Causation is the most important element of a legal malpractice case and is analyzed by the "case within the case standard." Because there is a two tier analysis to prove causation – causation in the underlying case and causation in the malpractice case – experts are needed for each tier. First, one or more experts must prove the underlying case by testifying that it was viable because it had causation. So in the hypothetical legal malpractice case based on an underlying medical malpractice claim, a physician expert must testify that medical negligence caused the client's injury and damages.

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Second, a standard-of-care expert, typically a lawyer practicing in the same field and geographic area as the defendant, must testify that the attorney's conduct in the underlying case was below the standard of care and caused damages. Note that these experts cannot, however, invade the jury function and testify that the client would have prevailed in the underlying lawsuit. The standard of care expert is not a substitute trier of fact, therefore his only analysis is as to the claim's viability.

The attorney considering a legal malpractice case must perform a meticulous analysis of the underlying facts. The negligent attorney likely made numerous decisions in the underlying case, and these need to be segregated and analyzed to determine if any were negligent. In essence, the malpractice attorney must unwind the web of the underlying case – strand by strand – to discover potential negligence.

• *Damages*

Even when negligence is proven, a legal malpractice claim fails without damages. To prove damages, the plaintiff's attorney must show that the client would have obtained a better result had the lawyer acted as a reasonably careful attorney. Although the defendant may argue that damages should not be awarded where *the amount* is uncertain because they are speculative, where causation and the *fact* of damages are proved, this argument is not valid. The test is whether damages exist and not whether they may be difficult to calculate. 2 Mallen and Smith, *Legal Malpractice*, § 19.3, pp. 599, et seq. (4th ed. 1996).

Economic damages: The client can recover compensatory damages for the value of the loss caused by the attorney's negligence *(Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 979-980 [105 Cal.Rptr.2d 88]). Economic damages include attorneys' fees the client spent attempting to rectify the malpractice. For instance, if the client had to sue a third party because of the attorney's breach, she can recover the attorney's fees incurred in such suit from the negligent attorney (*Vanguard Recording Society, Inc. v. Fantasy Records, Inc.* (1972) 24 Cal.App.3d 410, 419 [100 Cal.Rptr. 126]).

However, neither attorney fees paid to the plaintiff's malpractice attorney nor the fees paid to the negligent attorney are recoverable as tort damages. Legal fees paid to a negligent attorney may only be recoverable as damages if the client claims she paid for more legal services than she received. Under those limited circumstances, the client can recover the total amount of fees paid (*Orrick Herrington & Sutcliffe, LLP v. Superior Court* (2003) 107 Cal.App.4th 1052, 1060 [132 Cal.Rptr.2d 658]).

Emotional distress: Ordinarily, the client cannot recover emotional distress damages resulting directly from the lawyer's negligence *(Friedman v. Merck & Co*. (2003) 107 Cal.App.4th 454, 472 [131 Cal.Rptr.2d 885]). The exception is that the client may recover for emotional distress damages to which she would have been entitled in the underlying case had the attorney not been negligent.

Punitive damages: Punitive damages are rarely recovered in legal malpractice cases. They only apply where oppression, malice or fraud can be proven by clear and convincing evidence. In the absence of fraud or similar offenses against the client, punitive damages are unlikely. Note that punitive damages that may have been available in the underlying case, but were lost due to the negligence of the defendant lawyer, are *not* recoverable (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP* (2003) 30 Cal.4th 1037, 1046-1051 [135 Cal.Rptr.2d 46]).

Mitigating Damages: In an effort to limit damages, defense counsel may argue that they are excessive and should have been mitigated by the client. However, the duty to mitigate is limited and does not require the client to take measures that are unreasonable, impractical, unaffordable, or involve expenditures disproportionate to the loss sought to be avoided (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396 [67 Cal.Rptr. 796]).

Resolving the case

Legal malpractice cases often go to arbitration because most retainer agreements include an arbitration clause. Arbitration may work to the client's advantage because retainers which require arbitration often provide that attorneys' fees will be paid to the prevailing party. Of course, if the client does not prevail at arbitration, the economic risk to the client is greater.

As with most cases, mediation should be attempted before trial in an effort to avoid the significant time and expense associated with arbitration or trial.

Additional pointers on dealing with clients

Legal malpractice clients may be apprehensive of lawyers because their relationship with their previous lawyer did not end amicably. Therefore, the malpractice attorney must take special care to be sensitive to and communicate with the client. Since the client has now been involved in multiple suits, at least one involving another attorney, the malpractice attorney must realize that a bad relationship may entail eventually getting sued by the client.

One of the key components to keeping malpractice clients satisfied is keeping them informed. Because the client had a bad experience with another lawyer, strategic inquiries are to be expected and must be responded to in a timely fashion. The client, once burned by a lawyer, may have suggestions for the malpractice attorney. These need to be addressed, no matter how trivial they seem.

Although a phone call suffices for many matters, the attorney should send the client letters about important events and decisions, and provide copies of all substantive writings. The malpractice attorney should consider sending the client written summaries of significant conversations with opposing counsel, issues that arise during deposition or other discovery, summaries of court hearings, and, most importantly, any settlement communications received from the other side. Failure to do so may be at the malpractice attorney's peril.

Malpractice files must document that the client understands and agrees with the lawyer's strategies and recommendations. This is a matter of fairness to both attorney and client and may ensure that

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the relationship does not end in another malpractice suit.

Conclusion

As lawyers, we have great powers and privileges. Because most lawyers are ethical and conscientious in dealings with clients, in rare instances the malpractice attorney is necessary to protect consumers from the incompetence and wrongful deeds of a small minority of lawyers.

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