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Emotional Distress Claims in Legal Malpractice Cases

Lawyers face a number of risks each day when they walk into their offices or a courtroom. Legal malpractice insurance premiums continue to rise, in large part because claims and payments for claims continue to rise. To date, when facing legal malpractice claims, lawyers have been pretty much immune from damage claim for emotional distress. That bar isn't universal, however.

The *general* rule across continues to be that emotional distress claims are not recoverable if they arise from damages caused by a lawyer's negligence. *See generally* Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 21:11 (2010 Ed.); *Sanders v. Rosen*, 605 N.Y.S.2d 805 (1993).

States that do allow emotional distress damages sometimes do so if the plaintiff can prove exceptional circumstances, for example California and Texas have limited recovery for emotional distress in exceptional cases. *See Rhodes v. Batilla*, 848 S.W.2d 833 (Tex.App.1993) (emotional distress damages recoverable in legal malpractice case under extraordinary or egregious circumstances); *Merenda v. Superior Court*, 3 Cal.App.4th 1 (1992) and *Williams v. Russ*, 2004 WL 846786 (Cal. App 2004) (unreported decision) (together these cases suggest emotional distress damages generally not recoverable in legal malpractice actions but can be recovered if the claim involves breach of fiduciary duty or if the emotional distress naturally ensues from the acts complained of).

The question isn't frequently litigated but does still surface from time to time. Much of the case law is over a decade old but two recent decisions show the issue still isn't settled.

A Connecticut court earlier this summer refused to allow a woman claims for emotional distress damages from her former lawyer. She

claimed that he had promised to sue a bar that over served a patron. That intoxicated patron got behind the wheel of a car and struck the woman. The court didn't toss her legal malpractice claim; it simply ruled that she couldn't collect additional damages for emotional distress. That case is still pending. The judge's order was part of a motion to strike certain counts of the complaint.

Contrast that result with a decision from the Iowa Supreme Court last year (*Belasario, v. Said*) which allowed emotional distress claims against a lawyer accused of having botched an immigration case. This was apparently the first time in Iowa that the court allowed such a claim. In that case, a couple from Ecuador claimed their lawyer's negligence caused them to be separated from their children. Although that case offers some hope for legal malpractice victims in Iowa, the court said the lawyer's conduct was "willful and wanton" and not merely negligent.

Clearly the level of the lawyer's malpractice and the type case may have some bearing on whether emotional distress damages can be recovered in legal malpractice cases. The foreseeability of emotional distress claims can also be a determining factor.

This post isn't designed to survey the law in all 50 states. Our hope is to simply raise the issue and note that there appear to many exceptions to the so-called general rule against emotional distress damages in legal malpractice cases.

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