



By John P. Blumberg

Legal malpractice: What it is, what it isn't, and how to prosecute it

The legal malpractice case is a two-edged sword. As advocates, we may be called upon to file one on behalf of a client who was injured by legal malpractice; but as practitioners, we dread the possibility of being named in one as a defendant. This article is for every lawyer confronted with the possibility of having committed malpractice, and for the lawyers who will pursue or defend the lawsuit.

What is legal malpractice?

A lawyer has an obligation to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise under similar circumstances. *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 308 [146 Cal.Rptr. 218]. Attorneys fall below the standard of care if "their advice and actions were so legally deficient when given that it demonstrates a failure to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performing the tasks they undertake." *Unigard Insurance Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1237 [45 Cal.Rptr.2d 565]. To fall below that standard of care is negligence, commonly referred to as malpractice.

What isn't malpractice?

A lawyer's advice on an unsettled point of law does not have to be right every time. There is no liability for failing to anticipate how a debatable point of law will be resolved, so long as the advice given was based on an intelligent assessment of the problem after reasonable research was performed. *Smith v. Lewis* (1975) 13 Cal.3d 349, 358 [118 Cal.Rptr. 621] (overruled on other grounds, 15 Cal.3d 838, 851).

Likewise, in litigation, an attorney must constantly make strategic judgments. For example, during trial it is generally accepted that the choice of what witnesses to call, what evidence to introduce, and whether or not to cross-examine

a witness are exercises of judgment. These decisions may, in hindsight, be questioned. But if the actions were based on informed judgment, the attorney should be immune from liability for the consequences of an unsuccessful gambit. Nevertheless, if a tactical decision was foolish, ill-considered or unduly risky, it may be found negligent if the attorney's strategy was not based on informed judgment. *Mallen & Smith*, 4 Legal Malpractice (West, 5th ed. 2000) section 30.39. As the court stated bluntly in *Smith v. Lewis*, "There is nothing strategic or tactical about ignorance." *Smith v. Lewis, supra*, 13 Cal.3d at page 359.

Must there be an actual loss?

Even if there is clear and unmistakable negligence by an attorney, there will be no malpractice liability absent actual harm. The plaintiff must prove that a breach of the duty of care resulted in injury and actual loss. Nominal damages, speculative harm or the threat of possible future harm are insufficient to establish a cause of action for malpractice. *Alhino v Starr* (1980) 112 Cal.App.3d 158, 176 [169 Cal.Rptr. 136].

Settle and sue?

When the client sues his lawyer after entering into a settlement, even the probability of harm will not allow recovery; legal certainty is required. For example, in *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1519 [86 Cal.Rptr.2d 1], the plaintiff alleged that the defendant attorney had negligently negotiated a marital settlement agreement on behalf of a husband. Nevertheless, the court found that there was no way to prove that a different settlement would have been accepted by the wife, or that the court would have ordered a division of property more favorable to the husband. Every lawyer who has negotiated a settlement knows that the basis of a compromise is, at best, an educated guess of what might occur at trial and what the opponent will pay or accept. Because the concept of a

"reasonable settlement" involves a wide spectrum of considerations and broad discretion, a leading commentator on legal malpractice includes settlement advice in the protected category of a judgment call. *Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1462 [1 Cal.Rptr.3d 175], citing 4 *Mallen*, Legal Malpractice (5th ed. 2000) section 30.41, page 588.

This is not to say, however, that an attorney is absolutely immunized from liability for negligently negotiating a settlement. For example, if the attorney did not adequately counsel his client regarding his options, an argument might be made that the client would have chosen to proceed to trial had she known all the facts. After all, the ultimate decision of whether to settle a case belongs to the client. Under this theory, the plaintiff would argue that the value of the case is properly determined by the jury in the "trial-within-a-trial" scenario, discussed below.

Did the underlying case have merit?

Where the negligence of the former attorney resulted in the loss of a meritorious claim, that lost claim is called the "underlying case." A legal malpractice case will be unsuccessful if it cannot be proved that the underlying case had merit or that the result would have been different absent attorney negligence. The crucial causation inquiry is what would have happened if the lawyer had not been negligent. *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1242 [135 Cal.Rptr.2d 629]. It is also not enough that the prior lawyer was negligent; his or her error must have caused damage. *Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849]. A legal malpractice case is viable only if there is underlying causation. That is to say, "no harm, no foul." Thus, the former client must establish that, but for the attorney's negligence, a more favorable judgment would have been attained. *Viner, supra*, 30 Cal.4th at page 1241.

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The case-within-the-case

After it is proven that the prior lawyer was negligent, there must be a trial (or retrial) of the underlying case. This is called a “trial within a trial.” *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 334 [282 Cal.Rptr.368]. If the jury in the legal malpractice case finds that the underlying case would not have been successful, the plaintiff loses. Liability arises only when an attorney’s negligence has resulted in the loss of the client’s meritorious claim. *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313]. In many circumstances, the defense will request that the court bifurcate the trial so that the underlying case is tried first. A theory behind this strategy is that a jury’s bias against attorneys can be avoided if the jury must first determine the merits of the underlying case. An argument against bifurcation is that it will unduly lengthen the trial, and that in medical malpractice cases, the issues of duty and causation are seldom bifurcated.

Settlement value is irrelevant

Most legitimate cases are resolved by settlement. In a legal malpractice case alleging a blown statute of limitations, can an expert testify that the case would have been settled and what the reasonable settlement value would have been? No. To recover damages in such a legal malpractice action, the plaintiff must prove negligent investigation, advice or conduct of the client’s meritorious case, and that the underlying case would have resulted in a collectible judgment in the plaintiff’s favor. Even the probability of a settlement is not relevant. *Campbell v. Magaña* (1960) 184 Cal.App.2d 751, 753-54 [77 Cal.Rptr. 544].

Practice pointer: Evaluate before filing

Before embarking on a legal malpractice claim, it is imperative to make a thorough evaluation of the merits of the case allegedly mishandled by the previous lawyer. Evaluation of the underlying case where the former lawyer has been negligent is no different from evaluation of any case: If there is no harm, the negligence is irrelevant. For example, if no

one were hurt in a car accident, no lawsuit for personal injuries would be justified. Similarly, a medical malpractice case cannot be based on the claim, “If I had taken the pills that the doctor negligently prescribed, I would have died.” In both of these situations, a lawyer’s negligence would not turn the underlying case into a winner. And if the underlying case had no merit, there is no basis for a legal malpractice case.

Merit cannot be proven by the belief or advocacy of the previous attorney. It is irrelevant that the negligent attorney had previously argued that the case had merit or its value. “Given the nature of litigation and duty of an attorney toward his or her client, we can find no support in law or logic to support such a proposition.” *Loube v. Loube* (1998) 64 Cal.App.4th 421, 428 [74 Cal.Rptr.2d 906]. Therefore, the attorney-defendant can defend himself by arguing that the underlying case lacked merit.

Practice pointer: Obtain the file

The file must be obtained before the lawsuit is filed. California Rules of Professional Conduct, rule 3-700(D) provides that an attorney “whose employment has terminated shall: (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. ‘Client papers and property’ includes correspondences, pleadings, deposition transcripts, exhibits, physical evidence, expert’s reports, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not” Citing this rule, the Court of Appeal held that “in general, the documents within an attorney’s legal file belong to the client.” *Eddy v. Fields* (2004) 121 Cal.App.4th 1543 [18 Cal.Rptr.3d 487]. Some courts have held that even the attorney’s work product belongs to the client. *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950 [203 Cal.Rptr. 879]. The ownership of work product is, however, far from settled. *Metro-Goldwyn-Mayer, Inc. v. Superior Court* (1994) 25 Cal.App.4th 242, 247 [30 Cal.Rptr.2d 37].

Once the file has been obtained, the case must be evaluated as though no previous attorney had ever been involved.

Witnesses must be interviewed, documents must be examined, and experts must be consulted. If this evaluation satisfies you that the case has merit, you are almost, but not quite, justified in filing a complaint for legal malpractice.

Would a judgment have been collectible?

Collectibility of the lost potential judgment in the underlying case also must be proven. Even if there were admitted negligence in the underlying case that would have resulted in a jury verdict for \$1 million, no cause of action for legal malpractice can be established if it would have been uncollectible. For example, a lawyer’s negligence resulting in the loss of the plaintiff’s right to sue an insolvent, uninsured and unemployed driver would not cause the plaintiff any damage, because no money would have been collected from the negligent driver, even if the case had been prosecuted to judgment.

Proving collectibility can sometimes be a challenge, and that factor must also be taken into consideration in representing a plaintiff in a legal malpractice case. If the former defendant had liability insurance, the policy can be obtained as evidence. In noninsurance litigation, however, proving personal worth may pose many problems. For example, can the former defendant, who is not a party to the malpractice case, be compelled to testify and produce documents relating to income, savings and investments? The challenge, therefore, will be to determine whether proof can be adduced from other means, such as property owned by the underlying defendant. If collectibility cannot be proven, the legal malpractice case will fail. *DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1509 [33 Cal.Rptr. 2d 219].

Damages

In some situations, the legal malpractice plaintiff must prove that the damages were reasonably certain. But when the attorney’s negligence resulted in the loss of the right to present a case at trial, the jury will determine the value of the plaintiff’s loss. (See “case-within-a-case,” *supra*.) However, there are some

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limitations: namely, emotional distress, punitive damages and attorney's fees.

Emotional distress damages

If emotional distress was an element of the legal malpractice plaintiff's damages in the underlying case, he or she may recover such damages in the legal malpractice claim. However, damages are generally not recoverable for emotional distress caused by an attorney's malpractice. The rationale behind this preclusion is that the goal of most litigation is monetary recovery. "The expectation of a recovery is rarely so certain that a litigant would be justified in resting her peace of mind upon the assurance of victory." *Camenisch v. Superior Court* (1996) 44 Cal.App.4th 1689 [52 Cal.Rptr.2d 450]. Therefore, when the loss is economic, whether because of a lost lawsuit or bad tax advice, there can be no recovery for emotional distress.

The exception to the rule precluding recovery of damages for emotional distress arises in the context of the loss of a personal right. In *Holliday v. Jones* (1989) 215 Cal.App.3d 102 [264 Cal.Rptr. 448], attorney negligence contributed to Holliday's manslaughter conviction and imprisonment. Because the loss was liberty and not an economic or property interest, the *Holliday* court permitted recovery of emotional distress damages against the negligent attorney. *Id.* at page 119. Query whether the loss of child custody caused by attorney negligence might support a claim for emotional distress, because it is not a property or economic interest and emotional harm is foreseeable. The court might hold — as in *Camenisch, supra* — that the outcome of a trial is anything but certain and emotional distress would be unwarranted. But who knows? The issue is untested.

Punitive damages

If the underlying case involved a claim for punitive damages, can the plaintiff recover those punitive damages in the subsequent legal malpractice case? No. Even though an award to the plaintiff that included punitive damages would be compensatory in nature, our Supreme Court has held that such an award would violate the public policy considerations that justify punitive damages. In *Ferguson*

v. Loeff, Cabraser, Heimann & Bernstein (2003) 30 Cal.4th 1037, 1046-47 [135 Cal.Rptr.2d 46], the court explained:

Making a negligent attorney liable for lost punitive damages would not serve a societal interest, because the attorney did not commit and had no control over the intentional misconduct justifying the punitive damages award. Imposing liability for lost punitive damages on negligent attorneys would therefore neither punish the culpable tortfeasor . . . nor deter that tortfeasor and others from committing similar wrongful acts in the future.

Attorney's fees

Can a negligent attorney deduct what his contingent fee would have been on the ground that the plaintiff's actual damage is the net after deduction of fees? No. This argument was rejected in *Kane, Kane & Kritzer, Inc. v. Altagen* (1980) 107 Cal.App.3d 36, 44 [165 Cal.Rptr. 534], where it was held that "[c]rediting the defendant with a fee he has failed to earn not only rewards his wrongdoing, but places on plaintiffs' shoulders the necessity of paying twice for the same service."

However, attorney's fees can be recovered as an item of damages if it was necessary to pay a subsequent attorney to remedy the error committed by the negligent attorney or to defend or engage in litigation which would not have been necessary, except for the prior attorney's negligence. "The theory of recovery is that the attorney fees are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action." *Sindell v. Gibson, Dunn & Crutcher* (1997) 54 Cal.App.4th 1457, 1470 [63 Cal.Rptr.2d 594].

Statute of limitations

Code of Civil Procedure section 340.6 provides for a one-year limitations period that begins when the client discovers or should have discovered the facts constituting the wrongful act or omission, not to exceed four years. Except in cases of actual fraud, the limitations period is tolled when (1) there has been no actual injury; (2) the attorney continues his or

her representation regarding the specific subject matter after the alleged negligence occurred; (3) the attorney willfully conceals the facts constituting the negligence; and (4) the plaintiff is under a legal or physical disability restricting his ability to commence legal action. If the negligence involves an instrument in writing, the effective date of which depends upon a future act or event, the limitations period commences to run upon the occurrence of such act or event.

Actual injury

Needless to say, "actual injury" has been the subject of many appellate decisions that have explored numerous variations. These variations and the difficulty in analysis were discussed in *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, 971 [41 Cal.Rptr.2d 573]:

The variety of situations in which [attorney] error can occur, and the injuries that can result, make it difficult to formulate and apply bright-line tests for "actual injury" that resolve statute of limitations problems in all settings [T]he facts and circumstances of each case determine when the plaintiff suffered actual injury The variety of the conclusions appellate courts have reached attests to the validity of these generalizations The broad principle of general applicability which may be derived is that the effect of asserted legal malpractice should not be identified as actual injury until it has reached a point (on a continuum between the asserted malpractice and the point at which its injurious effects become "irremediable") at which injury has been made to appear with an empirical certainty sufficient to allay the law's distaste for speculation.

Notwithstanding "the law's distaste for speculation," the court in *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 227 [31 Cal.Rptr.2d 525] said: "Thus, when malpractice results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been actual injury regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred."

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Appeals and actual injury

It would be logical to conclude that the pendency of an appeal forestalls the occurrence of an actual injury caused by legal malpractice. Nevertheless, our Supreme Court decided otherwise in *Laird v. Blacker* (1992) 2 Cal.4th 606 [7 Cal.Rptr.2d 550]. Although the court recognized that the outcome might be altered by the appeal, it reasoned that actual injury occurs upon entry of final judgment and appeals are not one of the tolling factors specified in the statute.

Practice pointer: Early filing or tolling agreement

In some cases, the permanency of the harm may not be realized until some future event, such as an appellate decision or the outcome of a related lawsuit. The last thing a lawyer wants to do is to commit malpractice by filing a legal malpractice complaint too late, but a complaint filed too early can create other problems. A viable option is to negotiate a tolling agreement with the potential defendant until the future reveals itself. If a tolling agreement is not acceptable, then it is best to file the complaint and move for a stay.

Can the case be saved?

It is incumbent on the attorney representing the legal malpractice plaintiff to

explore all possible avenues of resurrecting the client's case. If an action could have been filed but, instead, you filed a legal malpractice complaint, the next lawsuit might be against you. Therefore, before assuming that the former lawyer's neglect resulted in the loss of a client's rights, consider all possible alternate remedies, alternate forums and tolling provisions such as absence from the state (Code Civ. Proc., § 351), bankruptcy (Code Civ. Proc., § 356), State Bar action (Code Civ. Proc. § 353.1), partial payment by an insurance company (Ins. Code, § 11583), death of a party (Code Civ. Proc., §§ 366.1 & 366.2), actions against felons (Code Civ. Proc., § 340.3), and even "equitable tolling."

Equitable tolling of the statute of limitations was employed in an unusual case where the plaintiff's attorney, who was on his way to the courthouse to try a case, was hit by a car and seriously injured. While he was incapacitated, the statute of limitations expired on another of his cases. But the statute of limitations was tolled under Civil Code section 3531: "The law never requires impossibilities." *Lewis v. Superior Court* (1985) 175 Cal.App.3d 366, 380 [220 Cal.Rptr. 594].

Don't overlook judicial error

Don't assume that an adverse result was malpractice; it may have been judicial error requiring an appeal. In *Pete v.*

Henderson (1954) 124 Cal.App.2d 487 [269 P.2d 78], the successful malpractice defense established that the original trial judge had ruled incorrectly; that the lawyer had not been negligent; and that the failure to take an appeal was the sole cause of the client's damage.

Conclusion

An attorney evaluating a potential legal malpractice claim must entertain the possibility that the previous attorney accepted a meritless underlying case and inflated the client's expectations without first performing an adequate investigation, or may have incorrectly given advice that the client's rights were lost. Strategic decisions and judgment calls based on informed consideration are not actionable. A prompt and complete analysis of the underlying case must be made to determine whether the plaintiff still has some viable rights in that case or whether the underlying case lacked merit or had no significant collectible damages.

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