

Legal Malpractice

by Thomas T. Dunbar, Esq.

There is a growing awareness of “legal malpractice” though the public and courts have often ignored it. Recent subtle contributors to malpractice also occurred. Business-oriented legislatures continue to enact laws with technicalities intended either to prevent suits or trip up lawyers who handle certain types of cases. Technicalities such as strict-time limitations to sue, a requirement of providing a formal “Notice of suit” prior to being able to bring suit, and/or “expert affidavits” required at time of the filing are but a few examples of “hurdles” enacted to benefit defendants (by increasing the burden of claimants and their attorneys). If these requirements are not adhered to, a suit could be dismissed which then sets the stage for a malpractice claim against the offending attorney. New laws requiring strict disclosure of witness and/or expert opinions may also lead to evidence being barred such that the value of a lawsuit is severely diminished costing the injured plaintiff much or all of her recovery.

Most people recognize that failing to file a lawsuit before the applicable statute of limitations can bar a claim thus preventing a client from filing suit. If the fault of a retained attorney, most understand that this type of mistake provides a good basis for a valid legal malpractice claim. However, not every mistake made by an attorney is considered legal malpractice. Instead, legal malpractice occurs when an attorney handles a case inappropriately due to negligence or with intent to harm and causes damage to a client. To prevail in a malpractice lawsuit based on negligence, you must prove an attorney-client relationship between you and the lawyer, a breach of the duty to provide skillful and competent representation (negligence), causation, and a financial loss. (Legal malpractice can also be based on “breach of fiduciary duty” which is discussed toward the end of this article.)

The first element requires proof that an attorney gave or promised to give you legal advice or assistance and therefore created an attorney-client relationship in which you were owed competent and skillful representation. Usually, this relationship is created by a written contract or agreement, but it also can be implied from an attorney’s actions in connection with the client’s actions. In some states, if a client has a reasonable belief that there is an attorney-client relationship, that is enough to find an attorney-client relationship. The nature of this element could vary depending on the ethics rules of the State Bar in your state, and sometimes attorneys when sued do contest that there was an attorney-client relationship.

The second element of attorney negligence is similar to the standard of care for medical negligence. In performing legal services, an attorney must exercise the care, skill, and diligence that are commonly exercised by other attorneys in similar conditions and circumstances. An attorney can never insure a particular outcome, and a failure to choose the best strategic course of action does not necessarily amount to a breach of duty.

Sometimes an attorney can choose a strategy in good faith that at the time chosen was reasonable. However, if a reasonably prudent attorney with the skill and competence level necessary to provide competent legal services would not have made the decision made by the attorney, there may be a breach of duty. It is also important to note that a simple ethics

violation is rarely the basis of a legal malpractice action, even though it is a breach of duty.

With regard to the third and fourth elements, you must show that if the attorney had not been negligent or otherwise acted wrongfully, you would have been successful in the underlying case. It can be challenging to prove that the outcome of a legal proceeding would have been different if your attorney had acted differently. When a financial loss would have happened irrespective of the attorney's mistakes, there is no causation and thus no valid malpractice claim. For example, if your attorney failed to communicate with you regularly, but whatever information he could have received from you would not have changed the outcome of the trial, there is no loss caused by his negligence so there is not a valid malpractice claim.

Some common kinds of malpractice include failure to meet a filing or service deadline, failure to sue within the statute of limitations, failure to perform a conflicts check, failure to apply the law correctly to a client's situation, abuse of a client's trust account, such as commingling trust account funds with an attorney's personal funds, and failure to return phone calls. Additional malpractice can occur when an attorney chooses to use an expert that is not qualified to opine on an important issue in the case. Failing to secure an expert can also prevent a client from meeting his or her burden at trial and lead to damages. Also, failing to put on necessary proof via a lay witness can result in certain damages not reaching the factfinder and thus cause damage to the client. (Various experts may be necessary to prove various issues in a case such as the issues of "negligence", and/or "breach of contract" and then "damages" that resulted.)

A plaintiff in a negligence-based malpractice action must establish proximate cause by the so-called "trial-within-a trial" test. That is, the client must show that but for his attorney's negligence he would have been successful in the prosecution or defense of the underlying action. But Courts may not require a plaintiff that has alleged a "breach of fiduciary duty" malpractice to establish that, but for the breach, the plaintiff would have won the underlying case. The proof required to prove proximate cause in such cases can be "tailored to the injury the client claims and the remedy he elects...". *Crist v. Loyacono* 65 So. 3d 837, 842 (Miss. 2011) In *Crist*, sixteen former clients of attorneys who were handling their Fen-Phen product liability claims alleged their settlement funds received were less than the amounts received by the larger group of plaintiffs also represented by the Defendant attorneys. The sixteen plaintiffs alleged legal malpractice based on breach of fiduciary duty (sometimes called breach of the "standard of conduct") when they received less under Defendants' settlement matrix used to classify injuries and amounts to be distributed to each classification from the \$39 million settlement with Defendant American Home Products ("AHP").

Counsel for the Defendant lawyers defended, in part, claiming that the sixteen plaintiffs did not present proof that but for the alleged malpractice they would have been successful against the drug manufacturer at trial. ("the case within a case defense"). The Supreme Court differentiated a legal malpractice claim based on breach of fiduciary duty by providing an example why the plaintiffs were not required to prove proximate cause by the "trial within a trial test" -- "... suppose a lawyer receives a client's settlement check in a doubtful claim, but procrastinates negotiating the check. Meanwhile, the defendant files bankruptcy, the check is

no longer good, and the clients receives nothing. It is no defense to the client's lawsuit against the procrastinating lawyer that the client cannot prove that he would have won at trial because the underlying claim was doubtful. The same is true here. The fiduciary-duty claim against the lawyers survive, even absent a showing that plaintiffs would have won the underlying Fen-Phen lawsuit against AHP." *Id.*, at p.843

The time limit to file suit is known as the Statute of Limitations and **varies** depending on what state the alleged negligent act occurred in. Mississippi's statute of limitations is three years for legal malpractice. Miss. Code Ann. Section 15-1-49, *Bradley vs. Jordan* 182 So. 3d 439, 440 (Miss. 2016)

Be sure to file your suit before the applicable statute of limitations runs or your claim may be time-barred. Disputes often arise over when did the client learn (or should have learned) of her attorney's alleged malpractice? A client should actively explore the possibility of malpractice to learn facts that may support a claim for malpractice. A client is required to exercise "reasonable diligence" to learn if her attorney breached the standard of care. *Jennings vs. Shuler* 147 So. 3d 847,854 (Miss. Ct. App. 2014). (The time limit to file suit can extend beyond the statute of limitations statutory time if the alleged malpractice was fraudulently concealed or if a "client exercising reasonable diligence" would not have discovered the alleged malpractice until later.)

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