BACE LAW REPORT

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So You Want to Sue...Your Lawyer?

Individuals that practice law or medicine are human; they are not immune from mistakes - whether inadvertent, negligent, or intentional. Attorneys are charged with a duty, legally and ethically, to protect and pursue the rights of their clients with reasonable effectiveness. Depending on the nature and magnitude of the case, attorneys are regularly trusted with sensitive information, charged with deciphering complex language, and responsible for navigating complex rules. The consequences of a mistake can be devastating to the client. A missed deadline can result in a complete forfeiture of a legal claim. A lack of preparation or negligent preparation can result in the loss of an otherwise viable civil claim, or a committed prison sentence for an otherwise defensible criminally accused. Legal malpractice claims, like medical malpractice claims, are some of the most complex and difficult cases from a plaintiff's perspective.

A plaintiff seeking to prevail on a claim of legal malpractice must establish the following:

- an attorney-client *relationship*;
- a *duty* to exercise a reasonable degree of care and skill in the performance of the attorney's legal duties;
- a *violation* or *breach* of that duty, and,
- reasonably foreseeable loss or *damages* caused by the attorney's negligence. *Correia v. Fagan*, 452 Mass. 120, 127 (2008).

Whether or not an attorney-client relationship existed is often a legitimate question. Most prudent attorneys memorialize the relationship with a written fee agreement, which clearly defines the scope of the relationship. However, there are instances where advice is given informally, without a disclaimer, and it is relied upon by the client to her detriment.

The law does not require attorneys to be superhuman; perfection is not the reasonable degree of care. The law does demand that attorneys handle their cases with knowledge, skill, and diligence, but it does not demand that they be infallible or always secure the best outcome for their clients. *Meyer v.*

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Wagner, 429 Mass. 410, 419 (1999).

Whether or not a violation or breach of the duty to exercise the requisite degree of care is a question that generally can only be answered by expert testimony. An attorney (witness) generally must testify as to the degree of care required to establish that the attorney (defendant) failed to meet the standard of care owed in any particular case. *Pongonis v. Saab*, 396 Mass. 1005, 1005 (1985). Only in a case where the claimed legal malpractice is so gross or obvious that a layperson can rely on their common knowledge will an expert be unnecessary.

Damages and causation in the legal malpractice context usually require the proving of the 'case within the case.' In order to prove that the attorney was negligent, and that negligence caused damages, the plaintiff must prove that they would have won the *underlying* or previous case but-for the attorney's actions.

In the criminal defense context, a plaintiff must prove that their attorney was negligent *and* that they were actually innocent of the crime charged in the underlying matter. *Correia v. Fagan*, 452 Mass. 120,127 (2008). If one is convicted of a crime, and then sues the former defense attorney, she must prove actual innocence to prevail as a plaintiff. Instead of rebutting the Commonwealth's burden to prove beyond a reasonable doubt that a crime was committed, as a plaintiff, one has the burden of proving actual innocence.

In the civil context, the same standard applies. If one wants to sue a former attorney who represented her in a civil action, she must prove the 'case within the case.' That is, the plaintiff must show that the result of the underlying civil claim would have been successful if not for the attorney's negligence. From a practical perspective, this involves calling again the witnesses in the underlying claim, and proving again the elements of the underlying civil action.

Insurance Coverage

Attorneys in the Commonwealth are *not* required to carry malpractice insurance. In order to protect themselves from personal liability, most do. Insurance policies are contracts. In return for the payment of a premium each year by the attorney, the insurance company agrees to pay a third party who is damaged by the attorney's actions. The insurance company will only compensate the victim if the action is 'covered' by the insurance policy.

The relationship between attorneys and their malpractice insurance policies quickly complicates any legal malpractice claim. Under most insurance

policies, the insurance company has a duty to defend the attorney in the event they are sued for malpractice. Thus, in the event one sues their former attorney, an additional attorney from the insurance company will likely defend the litigation. They are required to do so via the insurance policy contract. Typical clauses state,

> "The Company shall have the right and duty to defend in the Insured's name and on the Insured's behalf a claim covered by this Policy even if any of the allegations of the claim are groundless, false or fraudulent."

If there is a question as to whether or not the attorney's policy *covers* the alleged negligence, then the attorney is generally afforded the right to choose an additional counsel to be paid for by the insurance company. This 'independent counsel' is charged with defending the lawsuit against one's former attorney.

Practical Considerations

From a practical perspective, legal malpractice claims are complex and thus, it is extremely difficult for a plaintiff to prevail. Based on the duty-to-defend clause in most insurance policies, attorneys generally benefit from excellent defense attorneys. Insurance companies are often large conglomerates, with extreme resources. Those resources are utilized to defend lawsuits filed against those attorneys that they insure.

Malpractice claims are expensive and time-consuming to prosecute. As discussed above, whether the underlying claim is criminal or civil, the malpractice claim requires proving the 'case within the case,' which requires a full review of the underlying matter by one's malpractice attorney. Further, expert testimony is generally required. Expert witnesses must be compensated for their time and opinion, which is costly.

If one sues an attorney who lacks insurance coverage, any successful recovery will likely be limited by that attorney-defendant's financial circumstances.

Legal malpractice claims generally must be brought within three years of the date when one learns of the malpractice; only a licensed malpractice attorney can determine whether or not the three years has expired. If you think that you have been the victim of legal malpractice, contact an attorney without delay.