Defending Legal Malpractice Claims in California and Nevada – A Day at the Beach or Stranded in the Desert?

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Let's face it, the last thing we want to deal with is a legal malpractice claim by a disgruntled former client who has gone the extra mile and sued, claiming that our conduct fell below the applicable standard of care and that he or she was damaged as a result. We would rather sit in the dentist's chair getting a root canal, which would be cheaper and a lot less painful. If you have the misfortune of facing a legal malpractice claim that could conceivably be brought in either California or Nevada, the odds are that California is the more favorable venue.

Generally speaking, California and Nevada law on legal malpractice track each other pretty closely. For instance, the applicable statute of limitation applies not only to legal malpractice claims, but breach of contract and breach of fiduciary duty claims arising out of the provision of legal services.[1] Additionally, a plaintiff claiming that his or her defense attorney botched a criminal matter must demonstrate that he or she has obtained post-conviction relief or reversal of the conviction (i.e., actual innocence) before a legal malpractice action will lie.[2] Similarly, neither state permits assignment of legal malpractice actions.[3] But this is where the similarities end.

There are significant differences that weigh heavily in favor of California if you have to defend the claim. This article will highlight the key issues that arise in virtually every malpractice claim, how they differ between California and Nevada, and what you as the practitioner or the attorney defending the legal malpractice claim can do to enhance your ability to defend successfully against the claim. Legal malpractice law has many nuances that can be a trap for the unwary practitioner. Knowing these nuances can be the difference between getting out on summary judgment (or defense verdict) and a significant jury verdict.

LEGAL MALPRACTICE IN GENERAL

Whether California or Nevada, there are certain issues in the context of legal malpractice claims that appear over and over again. As noted above, on many of the issues, the two jurisdictions align. However, there are a few key issues, such as scope of duty, causation, statute of limitations, and comparative fault that are significantly different. On other issues such as judgmental immunity,[4] which is an absolute defense to a legal malpractice claim, or collectability of the underlying judgment, there is no Nevada case law that addresses this defense. Not to worry, Nevada courts routinely look to California law on issues of first impression.

In order to establish a claim for legal malpractice, plaintiff must prove: (1) duty of the [attorney] to use such skill, prudence, and diligence as other members of [the] profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the [attorney's] negligence.[5] Additionally, in the context of litigation malpractice, plaintiff must establish that proper management of the underlying matter would have resulted in a favorable verdict and collection of the same.[6]

DUTY

In the context of legal malpractice, the duty owed to a client arises from the contractual nature of the attorney-client relationship, express or implied.[7] In other words, the attorney-client relationship cannot be forced unilaterally upon the attorney. While California is among a number of jurisdictions that has relieved the malpractice plaintiff of strict privity rules in pursuing an attorney (i.e., only the client can sue the attorney for malpractice), the courts narrowly construe the exceptions to the strict privity rule.

For instance, in *Lucas v. Hamm*,[8] the California Supreme Court held that an intended beneficiary of a will may pursue a claim against the attorney who negligently drafted the will where the beneficiary's interest was diminished and/or lost due to the drafting error.[9] However, that same intended beneficiary could not state a claim against the attorney for malpractice, where the claim was that the attorney failed to amend a will or trust to increase the beneficiary's share, [10] or if imposing a duty upon the attorney would create a conflict with the attorney's actual client (i.e., the testator).[11]

Conversely, while the case law is sparse, strict privity appears still to be the rule

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in Nevada.[12] In *Charleson v. Hardesty*,[13] the Nevada Supreme Court, relying upon California case law, held that an attorney representing a trustee assumes a duty to the beneficiaries of the trust. While *Charleson* speaks to the issue of duty to a third party who is not the client, it is in the context of the attorney representing the trustee, not the testator, which is generally the situation that arises in this context. In fact, the Ninth Circuit Court of Appeals in *Ladonicolas v. Beury*[14] noted this point finding that the language in *Charleson* suggesting an abrogation of the strict privity rule was mere dicta.[15]

While strict privity is a significant advantage, it is not fully developed and the *Charleson* court appears to be moving away from it. This is important for Nevada because a fair number of legal malpractice claims arise from estate planning issues largely brought by beneficiaries of trusts and/or wills for negligently drafting of estate planning documents.[16]

CAUSATION

Originally, California made a distinction between transactional and litigation malpractice in terms of causation. In this regard, courts held that the malpractice plaintiff did not have to show the harm would not have occurred but for the attorney's negligence in the transactional setting, but had to do so in the litigation setting.[17] That changed in 2003, when the California Supreme Court in *Viner v. Sweet*[18] held that "but for" causation applied to transactional and litigation malpractice, finding the prior distinction to be artificial given that the purpose of "but for" causation was to weed out conjectural and speculative claims.[19] Regardless of the nature of the malpractice claim, the court or jury must answer the same question: what would have happened in the absence of the alleged malpractice?

In California, the method of proving "but-for" causation is through the "trial-within-a-trial" methodology.[20] In other words, in order to show that the attorney's negligence caused the plaintiff harm, plaintiff will need to re-try the underlying case or reconstruct the transaction to show what would have happened without the alleged negligence. If the result is the same, then there is no malpractice as a matter of law because the attorney's alleged negligence did not cause the alleged harm.

However, if the result in the underlying action was better than what occurred with the attorney accused of malpractice that is not the end of the story. The next phase is the malpractice component where plaintiff must prove the remaining elements of his/her malpractice claim – duty, breach, causation (i.e., the different result was due to the attorney's negligence), damages and collectability.

Nevada courts, on the other hand, keep the artificial distinction between transactional and litigation malpractice. Regarding the latter, Nevada requires that the underlying matter in which the alleged malpractice has occurred be finally adjudicated because, until that time, plaintiff's damages are inherently speculative. There is no case law addressing the standard at trial for causation in the transactional context leaving defense counsel to guess how the Court would rule on this issue in a transactional malpractice action.

A classic example of a routine causation issue that arises in both transactional and litigation malpractice claims is the "settle and sue" case where the malpractice plaintiff settles the underlying lawsuit or dispute before a final adjudication leaving the question open whether the result would have been different had the matter been fully adjudicated.[21] In California, these types of cases are routinely disposed of on summary judgment given the difficult burden plaintiff must establish to prove the attorney's alleged negligence caused harm. Even if the matter is not disposed of on summary judgment, the plaintiff must establish this causation component at trial through the "trial-within-a trial" framework.[22]

There is no case law in Nevada addressing whether it adopts the "trial-within-a-trial" approach to proving causation in a legal malpractice action. However, in light of the courts' view regarding litigation malpractice and accrual of said claim, Nevada's requirement that the underlying case be finally adjudicated is the functional equivalent of the "trial-within-a-trial" approach to proving causation, albeit in the underlying matter as opposed to the subsequent legal malpractice action. This begs the question: if the attorney who committed malpractice takes the underlying case through final adjudication, how does the plaintiff show that he or she would have obtained a better result without re-trying the underlying case in the malpractice action?

The difficulty in Nevada's approach to this particular issue is that the "wait and see" approach as to the underlying action, to determine if there is resulting damage from the alleged malpractice, leaves the attorney in the untenable situation of not having the benefit of discovery and being required to obtain information informally in order to defend against the malpractice claim. With the underlying action ongoing, the parties to the underlying action may not be inclined to provide any information. Thus, if the litigation must be finally adjudicated through appeal before the claim accrues, the ability to preserve documentary evidence may be compromised and witness memories may fade, further complicating the attorney's ability to defend himself or herself in a subsequent malpractice claim in the event of an adverse decision in the underlying litigation.

STATUTE OF LIMITATIONS

The statute of limitations is perhaps the single most discussed issue in the case law involving legal malpractice claims. California's statute of limitations for legal malpractice is codified at California Code of Civil Procedure section 340.6, which provides that all claims against attorneys arising out of the provision of legal services, with the exception of actual fraud, must be commenced within one year from the time that plaintiff knew or should have known with reasonable diligence facts giving rise to the malpractice claim, or four years from the date of the alleged malpractice, whichever occurs first.[23]

The statute of limitations is tolled if: (1) plaintiff has not sustained actual injury; or (2) the attorney continues to represent the

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plaintiff on the specific subject matter of the alleged malpractice.[24] If the attorney actively conceals the facts giving rise to the malpractice claim, the four-year, but not the one-year, statute of limitations is tolled.[25]

Significantly, the courts have broadly construed "actual injury" for purposes of tolling to include the loss of any right, title or interest as a result of the attorney's alleged malpractice.[26] The amount of damage is not the determining factor. Rather, it is the fact that plaintiff has sustained appreciable damage that is sufficient to start the statute of limitations.[27] Examples of actual injury sufficient to start the statute of limitations include, but are not limited to, incurring attorney's fees to "correct" the alleged malpractice,[28] loss of development rights,[29] or the date the client entered into a binding agreement.[30]

Similarly, continuous representation can toll the statute of limitations provided the attorney continues to represent the client on the specific subject matter of the alleged malpractice.[31] The idea behind this is to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired."[32] For example, if an attorney is representing a client in a personal injury action and also handles the client's estate planning needs, the fact that the attorney continues to represent the client regarding his or her estate planning does not toll the statute of limitations if the attorney is sued for malpractice for missing the statute of limitations for filing the personal injury action. Conversely, where the attorney represented the client with regard to the sale of his or her partnership interest that involved cash and carryback note, re-negotiating the note constitutes continuous representation sufficient to toll the statute of limitations.[33]

Nevada's statute of limitations, however, is longer than California's and is codified at Nevada Revised Statute section 11.207. Section 11.207 provides that the claim, "whether based on breach of contract or breach of duty must be commenced within 4 years after the plaintiff sustains damage or within two years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever is earlier."[34]

By the express language of the statute, section 11.207, like its California counterpart, provides for tolling until the former client discovers the facts giving rise to the malpractice claim. Unlike California, there is no continuous representation tolling provision. Nevada's "actual injury" equivalent tolling provision for litigation malpractice claims is highly unfavorable for the defendant attorney because the Nevada Supreme Court has interpreted section 11.207 to toll the statute of limitations in the litigation malpractice context until the underlying action has concluded.[35]

Subsequently, in *Kopicko v. Young*,[36] the attorney dismissed the original products liability action with prejudice after discovering the correct manufacturer of the defective product. The attorney advised the client that a claim against the correct manufacturer may be time-barred and requested that the attorney nonetheless pursue a claim against the correct manufacturer. The manufacturer successfully moved to dismiss the claim on statute of limitations grounds. The *Kopicko* Court held that even though plaintiff had knowledge of the facts giving rise to the malpractice claim more than four years before the malpractice claim was filed, the malpractice claim had not accrued until the federal district court dismissed the underlying products liability action on statute of limitations grounds.[37]

Unlike its California counterpart, Nevada makes the artificial distinction between transactional and litigation malpractice for purposes of the statute of limitations. In a footnote, the *Kopicko* court suggested that a two-year statute of limitations applies to transactional malpractice claims and the four-year statute applies to litigation malpractice.[38] However, as noted above, requiring the underlying case to go to completion, including an appeal, before the malpractice claim accrues raises serious concerns about the counsel's ability to defend a malpractice claim at that point given the passage of time. Waiting until resolution of the underlying case in the hopes that the outcome may be dispositive of the legal malpractice claim is nothing more than wishful thinking.

A longer statute of limitations and unfavorable tolling provisions, particularly for litigation malpractice, make Nevada a less desirable venue to defend a legal malpractice action where there is a potential statute of limitations defense.

COMPARATIVE FAULT

Lastly, California and Nevada differ as to comparative fault issues. California follows the pure comparative fault approach, reducing plaintiff's recovery in proportion to plaintiff's negligence, regardless of whether plaintiff is 1% or 99% negligent. Along the same lines, through Proposition 51, California joint tortfeasors are joint and severally liable for all economic damages and severally liable for noneconomic damages.[39]

Nevada, on the other hand, takes the pure contributory negligence approach that provides that if plaintiff's negligence is greater than that of the defendant's, then plaintiff may not recover.[40] Similarly, Nevada does not provide for joint and several liability. Rather, defendants are severally liable for their proportionate fault.[41]

On this point, Nevada law is preferable since plaintiff's contributory negligence provides for a complete defense to a malpractice claim.

PRACTICAL CONSIDERATIONS

California is the more favorable venue when it comes to defending a legal malpractice action. There is well-established case law on most, if not all, of the daily issues that arise in these cases with a good majority of the cases favorable to attorneys. However, if faced with defending a legal malpractice claim in Nevada, with the longer statute of limitations and potentially lengthy underlying litigation before the malpractice claim is actually litigated, the Nevada

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practitioner can take a few steps to provide defense counsel with best available evidence to defend against the claim. Those steps include:

1 Having a well-defined legal services agreement with the client that clearly identifies who the client is and the scope of legal services provided. Most important, stick to it! With Nevada case law suggesting strict privity for malpractice claims, a well-defined legal services agreement that clearly identifies the client can be the difference between prevailing on a motion to dismiss and protracted litigation at least through summary judgment;

2 Taking meticulous notes of communications with the client and follow up with confirming letters on important issues such as advice provided on actions taken or not taken and why, settlement authority, and other important events throughout the representation. The longer the underlying case drags out, the more memories fade. Thus, a well-documented file that memorializes the case in writing will enable the attorney to recount events and advice that may otherwise be lost with the passage of time.

3 Maintaining detailed billing records. This means one entry for each task performed and no block billing. Individual entries do not allow opposing counsel to question the amount of time on a given task that would otherwise be susceptible to challenge if block billed. More important is the fact that detailed billing entries provide further evidence of work performed or discussions with the client and others that may not otherwise be documented.

4 Having policies and procedures in place to maintain hard and electronic copies of the client's file. If the client demands his or her file back, make sure that you make a complete copy to ensure that you have the complete universe of documents from your representation of the client.

Legal malpractice claims are second-generation lawsuits where the facts and circumstances giving rise to the claim have typically occurred years before the malpractice lawsuit is filed. In Nevada, with its four-year statute of limitations for litigation malpractice, the defendant attorney can be looking at six to seven years before a malpractice claim is filed. A well-documented file will help reduce the impact of faded memories of significant events that occurred during the attorney's representation and greatly enhance defense counsel's ability to successfully defend against a malpractice claim.

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ENDNOTES

1 *See Stalk v. Mushkin*, 125 Nev. 21, 29 (2009); *Khodayari v. Mashburn*, 200 Cal.App.4th 1184, 1190-1191 (2d Dist. 2011).

2 *See Morgano v. Smith*, 110 Nev. 1025, 1029 (1994); *Coscia v. McKenna & Cuneo*, 25 Cal.4th 1194, 1201-1202 (2001).

3 *Chafee v. Smith*, 98 Nev. 222, 223-224 (1982); *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 395 (2d Dist. 1976).

4 The judgmental immunity doctrine "relieves an attorney from a finding of liability even where there was an unfavorable result if there was an "honest error in judgment concerning a doubtful or debatable point of law …" *Blanks v. Shaw*, 171 Cal.App.4th 336, 378 (2d Dist. 2009).

5 *Hecht, Solberg, Robinson, Goldberg & Bagley, LLP v. Superior Court*, 137 Cal.App.4th 579, 590 (6th. Dist. 2006); *Day v. Zubel*, 112 Nev. 972, 976 (1996).

6 *Campbell v. Magana*, 184 Cal.App.2d 751, 754 (2d Dist. 1960).

7 *Fox v. Pollack*, 181 Cal.App.3d 954, 959 (1st Dist. 1993).

8 56 Cal.2d 583 (1961).

9 *Id.* at 591.

10 *Chang v. Lederman*, 172 Cal.App.4th 67, 81 (2d Dist. 2009).

11 *Goodman v. Kennedy*, 18 Cal.3d 335, 345 (1976).

12 *See, e.g., Hartford Accident & Indem. Co v. Rogers*, 96 Nev. 576, 580-581 (1980); *Warmbrodt v. Blanchard*, 100 Nev. 703, 706-707 (1984).

13 108 Nev. 878 (1992).

14 1994 U.S. App. LEXIS 6950 (9th Cir. 1994).

15 *Id.* at *8-10.

16 A 2012 study by the American Bar Association's Standing Committee on Lawyers Professional Liability demonstrated that estate planning was ranked fourth in terms of legal malpractice claims by practice area. Ewins and Vail, *Profile of Legal Malpractice Claims 2008-2011*, American Bar Association Standing Committee on Lawyers Professional Liability.

17 *California State Auto Ass'n Inter-Ins. Bureau v. Parichan, Renberg, Crossman & Harvey*, 84 Cal.App.4th 702, 711 (1st Dist. 2000).

18 30 Cal.4th 1232 (2003).

19 *Id.* at 1241.

20 *Piscitelli v. Friedenberg*, 87 Cal.App.4th 953, 970 (4th Dist. 2001).

21 *Filbin v. Fitzgerald*, 211 Cal.App.4th 154, 166-168 (1st Dist. 2012).

22 *Mattco Forge, Inc. v. Arthur Young & Co.*, 52 Cal.App.4th 820, 832-834 (2d Dist. 1997).

23 Cal. Code Civ. Proc. § 340.6(a).

24 *Id.* at § 340.6(a)(1) & (2).

25 *Id.* at § 340.6(a)(3).

26 *Adams v. Paul*, 11 Cal.4th 583, 589-591 (1995).

27 *Laird v. Blackler*, 2 Cal.4th 606, 625 (1992).

28 *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal.4th 739, 743-744 (1998).

29 *Foxborough v. Van Atta*, 26 Cal.App.4th 217, 227 (1st Dist. 1994).

30 *Hensley v. Caietti*, 13 Cal.App.4th 1165, 1175 (3d Dist. 1993).

31 *Crouse v. Brobeck, Phleger & Harrison*, 67 Cal.App.4th 1509, 1528 (4th Dist. 1998).

32 *Beale Bank, SSB v. Arter & Hadden*, 42 Cal.4th 503, 511 (2007).

33 *Id.* at 1528-1531.

34 Nev. Rev. Stat. § 11.207(1).

35 *K.J.B., Inc. v. Drakulich*, 107 Nev. 367, 370 (1997).

36 114 Nev. 1333 (1998).

37 *Id.* at 1336-1337.

38 *Id.* at 1337 fn. 3.

39 Cal. Civ. Code §§ 1431, 1431.2.

40 Nev. Rev. Stat. §41.141(1).

41 Nev. Rev. Stat. §41.141(4).