Malpractice

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Background

MALPRACTICE is professional NEGLIGENCE or (less frequently) professional misconduct. Attorney malpractice generally implies an unreasonable lack of skill, or failure to render professional services in a manner consistent with that degree of skill, care, and learning expected of a reasonably competent and prudent member of the legal profession. Claims against attorneys (lawyers) for legal malpractice are viable in all fifty states. There is no federal law governing attorney malpractice, and state statutes typically address only the appropriate STATUTE OF LIMITATIONS (limiting the time period) for filing claims or lawsuits against attorneys. However, state CASE LAW will define and set the parameters for actionable cases of malpractice within the state.

For legal malpractice to be "actionable" (having all the components necessary to constitute a viable cause of action), there must be a duty owed to someone, a breach of that duty, and resulting harm or damage that is proximately caused by that breach. The simplest way to apply the concept of proximate cause to legal malpractice is to ask whether, "but for" the alleged negligence, the harm or injury would have occurred?

Establishing the Attorney-Client Relationship

First and foremost, an attorney must owe a legal duty to a person before his or her competency in performing that duty can be judged. In American JURISPRUDENCE, a lawyer has no affirmative duty to assist someone—in the absence of a special relationship with that person (such as doctor-patient, attorney-client, guardian-ward, etc.). That "special relationship" between an attorney and his/her client is generally established by mutual assent/consent. This is most often confirmed by a written "retainer" agreement in which the client expressly and exclusively retains a lawyer and his/her law firm to represent the client in a specific legal matter.

Under rare and limited circumstances, a court may infer that an attorney-client relationship existed as a matter of law, even without a contract or agreement between the parties, and even without the attorney's ASSENT. Such a legal conclusion may be drawn from the facts presented, such as reliance on the part of the client (who believed in GOOD FAITH that an attorney-client relationship existed) or by the fact that the attorney provided more than just informal or anecdotal opinion or answer to a question. The paying of a fee or RETAINER is not dispositive in determining whether an attorney-client relationship existed, and courts generally defer to the

"client" and base their conclusions on—or at least give substantial weight to—whether the client believed such a relationship existed, confided in the attorney, and relied upon the professional relationship to his or her detriment.

In any event, once the requisite attorney-client relationship is established, the attorney owes to the client the duty to render legal service and COUNSEL or advice with that degree of skill, care, and diligence as possessed by or expected of a reasonably competent attorney under the same or similar circumstances. The "circumstances" may include the area of law in which the attorney practices (although all attorneys are deemed to have basic legal skill and knowledge in the general practice of law), the customary or accepted practices of other attorneys in the area, and the particular circumstances or facts surrounding the representation. The requisite degree of skill and expertise under the circumstances is established by "expert testimony" from other practicing attorneys who share the same or similar skill, training, certification, and experience as the allegedly negligent attorney.

Conduct vs. Performance

The practice of law requires state licensure. All fifty states have criteria governing admission to practice within their states. Although requirements may vary slightly, almost all states require graduation from an accredited law school, passing the "bar exam" (referring to the professional BAR ASSOCIATION of that state), and submitting to a review and investigation of one's personal background for ASSESSMENT of "character and fitness" to practice law. Accordingly, all new lawyers start their profession with an acceptable level of professional competency (as determined by graduation from law school and passage of a comprehensive bar exam which gauges their professional knowledge of the law), as well as an acceptable level of character and fitness to practice law (as determined by the state bar review board).

Each state also has adopted codes of conduct, disciplinary rules, and adjudicative boards to address issues of misconduct once attorneys are admitted to practice. The American Bar Association also promulgates and promotes its Model Rules of Professional Conduct (adopted by two-thirds of the states as of 2002).

Additionally, virtually all states now require periodic "updating" of technical and/or academic skills by the mandatory completion of a certain number of classroom or seminar hours each year. Attorneys may generally choose the topics in which these hours are completed, but there is usually a requirement that a minimum number of hours be completed in the area of "ethics." Attorneys who fail to complete these courses may not renew their license to practice for the upcoming year. Additional fines or penalties may apply.

That said, trained, licensed attorneys nonetheless may engage in questionable conduct, display a seeming lack of skill, or otherwise neglect or fail to properly render those duties owed to their clients, their adversaries, or to the judicial system as a whole, in their day-to-day practice of law. For those indiscretions and failures that have resulted in harm to a client, a lawsuit for legal malpractice may be an appropriate remedy.

What Constitutes Actionable Malpractice

State laws govern the viability of causes of action for legal malpractice. The laws vary in terms of time limits to bring suit, qualifications of "expert" witnesses, cognizable theories of liability, and proper party defendants/proper party plaintiffs. Notwithstanding these differences, there are common themes for all cases, and general agreement from state to state on particular instances of nonfeasance or malfeasance of professional duties that may constitute legal malpractice.

Not all instances of malpractice involve an attorney's handling of a case for trial (although persons generally think of attorneys within the context of matters involving LITIGATION). For example, an attorney may fail to file a request for variance in a county ZONING matter involving a parcel of real property or may fail to catch an error on closing documents submitted to him/her. An attorney may erroneously advise a client about an area of law, e.g. foreign ADOPTION. Or an attorney may otherwise act on behalf of a client, against that client's express authority or permission. Any of these may constitute examples of actionable legal malpractice.

Omission or Failure to Do Something (Nonfeasance)

At the top of the list of dreaded mistakes for any attorney is the failure to file a claim, notice, or lawsuit within the time prescribed by law. Inevitably, the client loses his or her right of action, and the entire cause is lost. Such a failure is "black and white" in the eyes of jurors, and disastrous for the client. Similarly, the failure to answer a claim, notice, or lawsuit on behalf of a client may result in FORFEITURE, loss of defense, or DEFAULT JUDGMENT entered against a client, often FATAL failures. A failure to appear in time to set aside a DEFAULT judgment is equally serious. Unfortunately, courts do not consider that the error was made by the attorney and not the client. The client must sue the attorney for malpractice to recoup his or her loss.

Probably second to the above, in terms of occurrence and viability, is the failure to provide required notice. Such failures may include the failure to notify potential heirs at law of a PROBATE matter, failure to provide notice to creditors of a pending action, failure to post public notice regarding a real property action, failure to appear in court, or failure to notify a client of an offer to settle the case, received from the opposing party. These matters generally constitute actionable malpractice if the client has suffered harm or damage as a result of the alleged failures.

Third in line is that group of failures which are serious but not always fatal to a client's interest(s). These include such things as failure to file a certain motion in court, failure to name the right parties in a lawsuit (very serious if the time period for filing expires), failure to take or obtain certain DISCOVERY (e.g., documents or EVIDENCE), failure to object to the admission of certain evidence at trial (more serious), failure to raise certain issues or questions at depositions, public hearings, trials, arbitrations and mediations, etc.

Sometimes overlooked but nonetheless considered malpractice is the failure to communicate with a client and/or keep the client apprized of the status of the legal matter. However, such instances of malpractice are seldom "actionable" (because of impalpable damages) and are better addressed through a grievance process or letter of complaint.

The above instances of failures are not comprehensive and are intended only as representative by way of example. Not all occurrences of the above "failures" will result in actionable malpractice in all jurisdictions and under all factual scenarios.

Failure to Perform or Do Something Competently (Malfeasance)

An attorney may be equally liable for malpractice if he or she performs the actions required by law, but does so in an incompetent or substandard manner. For example, an attorney may timely file a cause of action in court, but the complaint may fail to contain important details or averments (allegations), resulting in DISMISSAL of the suit. An attorney may take the DEPOSITION of a witness but ask irrelevant questions or fail to ask the necessary questions needed to elicit needed TESTIMONY. An attorney may prepare a last will and TESTAMENT for a client but accidentally leave out or miswrite a very important BEQUEST. An attorney may appear in time for a criminal sentencing HEARING but be wholly unprepared or unfamiliar with the case or the issues.

All of the above examples represent situations requiring levels of skill generally attributable to or expected of any competent attorney practicing law in any state. They do not require specialized knowledge in any particular area of law and do not require advanced levels of legal experience or expertise. They are considered examples of fundamental practice of law. Breaches or failures of this type are generally preventable, avoidable, and therefore, actionable in most cases.

Within the context of litigation, it should be mentioned that in most states, a client's retention of an attorney to represent an action at trial implies that the client has delegated to the attorney all decisionmaking regarding the manner in which the trial should be conducted or the case should be presented. Even if the attorney loses the case, and a judgment is entered against his or her client, it does not mean that any malpractice was committed; after all, in every trial, at least one competent attorney loses and one wins. Under a broad area of attorney discretion, commonly referred to as "trial tactics," errors in judgment at trial (e.g., whether or not to present a certain witness or introduce certain evidence) which are not patently substandard for the profession, do not generally give rise to a cause of action for malpractice.

Acting Outside the Scope of Authority, Duty, or Area of Competence

In addition, there are clear instances when attorneys should decline representation because they are not skilled enough—or do not possess the requisite subject matter knowledge— to provide competent representation for a client. By way of example, such legal matters as WRONGFUL DEATH by MEDICAL MALPRACTICE, complex CORPORATE mergers or buyouts, or complex financial transactions, should not be handled by new attorneys without supervision. Often, mistakes in taking on a new client are made when new attorneys want to "impress" their colleagues or superiors, or when sole practitioners need money or more cases.

An attorney retained to represent a client in one matter may unilaterally and without authority decide to represent a client, or act on the client's behalf, in another unrelated matter. The client may subsequently ratify the representation, or, if harmed, may sue for malpractice. Likewise, an attorney retained for a specific matter may unilaterally and without authority decide to accept an offer of SETTLEMENT for a certain amount of money, without the client's authority. This is a good example of malpractice but may not be "actionable" malpractice, if the client is unable to prove (by a preponderance) that he or she would have gotten more money had the matter gone to trial.

Filing a Malpractice Lawsuit

There are two important factors to remember about a cause of action for malpractice. First, a client should realize that a poor, unfair, or unexpected result does not mean that any malpractice occurred. Second, in the event that malpractice has occurred, the client must prove that he or she has suffered harm or loss due to the alleged wrongs on the part of an attorney. This is not as easy to prove as one might think. For example, if the alleged malpractice involved a matter in litigation, the client must prove that he or she would have won the case, i.e., a jury would have ruled in his or her favor, "but for" the alleged malpractice. This means that, in proving a case for malpractice, the client will have to actually "try" the "underlying case" before a real jury, and win it, in order to prove the point. Consequently, many lawsuits for malpractice are settled out of court to avoid the time, expense, and uncertainty of such a burden.

Alternatives for Addressing Malpractice

All states have attorney discipline boards or committees that accept informal or formal complaints from aggrieved clients. In matters that involve misconduct more than INCOMPETENCY, this may be the forum of

choice. Generally, disciplinary boards have authority to impose fines, order RESTITUTION to a client, and suspend or revoke a lawyer's license to practice law in that state. Clients also may wish to consider alternative dispute resolution, such as ARBITRATIONor MEDIATION, to settle their claims of alleged malpractice.

Finally, it is worth noting that attorneys are generally required to advise their clients of known instances of actionable malpractice that have harmed the client or caused loss or damage. By far, the majority of attorneys are honest, competent, and committed to providing good service, and will so advise clients in the event of a known failure. However, what may appear to a layman as "malpractice" at first blush, may in reality constitute no more than a decision or tactic employed by the attorney that conflicts with a client's expectation of likely action or outcome. Persons who believe that their attorneys may have committed malpractice are encouraged to consult with legal counsel who specialize in the area of professional malpractice.

Select State Laws on Limitations Period For Filing Malpractice Lawsuits

CALIFORNIA: Actions for legal malpractice must be brought within one year of discovery of a claim, with a maximum four years' limitation from the date of the alleged wrong. Proc: Section 340.6.

CONNECTICUT: Actions for legal malpractice must be brought within two years of discovery, with a maximum three years' limitation from the date of the alleged wrong. Section 52-584.

ILLINOIS: Actions for legal malpractice must be brought within a maximum of six years from discovery of the alleged wrong 735 ILCS 5/13/214/3.

KANSAS: Actions for legal malpractice must be brought within two years of discovery, with a maximum four years' limitation from the date of the alleged wrong. Section 60-513(a)(7), 60-513(c).

KENTUCKY: Actions for professional service malpractice must be brought within one year from discovery. Section 413-245.

MAINE: Actions for legal malpractice must be brought within two years, Section 753-A.

MISSISSIPPI: Actions for professional malpractice must be brought within two years. Section 15-1-36.

MONTANA: Actions for legal malpractice must be brought within three years from discovery, with a maximum ten years' limitation from the date of the alleged wrong. Section 27-2-206.

NEVADA: Actions for legal malpractice must be brought within four years. Section 11.207.

RHODE ISLAND: Actions for legal malpractice must be brought within three years. Section 9-1-14.1 and 9-1-14.3.

SOUTH DAKOTA: Actions for legal malpractice must be brought within three years. Section 15-2-14.2.

TENNESSEE: Actions for legal malpractice must be brought within one year Section 28-3-104.

Additional Resources

"American Bar Association Model Rules of Professional Conduct" 2001. Available at http://www.abanet.org/crp/mrpc/mrpc_toc.html.

"Attorney Malpractice" 2001. Halt Legal Information Clearinghouse. Available at http://www.halt.org/ELS/ELScontrol.cfm?getELS=elsB1.

"The Hierarchy of Attorney Malpractice" 2001. Available at http://attorneymal-practice.com/heirarchy.htm.

National Survey of State Laws 3rd Edition. Richard A. Leiter, Ed. Gale Group, 1999.

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