



Evaluating the legal-malpractice case

The complex statute of limitations and the “case within the case”

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Many of us have met with a potential client who wishes to bring a legal malpractice claim against a prior attorney. Legal malpractice claims are complex, governed by an extensive body of case law, and subject to a nuanced statute of limitations, all of which can make case evaluation challenging. This article discusses the statute of limitations applicable to legal malpractice cases and the issues of duty, breach, causation, and damages. These are key considerations that plaintiff-side legal malpractice practitioners can use to improve their case selection and determine whether a potential client has a worthy case.

Statute of limitations

Evaluating legal malpractice cases begins with understanding the relatively complex statute of limitations that applies per Code of Civil Procedure section 340.6. A full discussion of section 340.6 merits an article of its own; this article discusses a few critical concepts relevant to assessing whether to accept a legal malpractice case.

One-year limitations period

Section 340.6 generally provides a one-year limitations period for claims against attorneys, subject to some important exceptions. Subsection (a) of section 340.6 states, in part:

An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.

Thus, section 340.6 applies to any “action against an attorney for a wrongful act or omission, other than for actual fraud,” regardless of whether the claim is for professional negligence, breach of fiduciary duty, breach of contract, or another non-fraud claim.

The discovery rule

Section 340.6 also provides that the limitations period does not begin to run until the plaintiff “discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission,” and sets an outer time limit of four years even if the act or omission has not yet been discovered. The discovery rule is triggered by knowledge of the facts giving rise to the claim, even if the client does not understand that those facts constitute legal malpractice. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 685.)

Thus, when the limitations period appears to have passed, but the potential legal malpractice plaintiff states that they did not learn of the malpractice until some date within the past year, it is critical to determine what facts they had knowledge of and when. It is often the case that plaintiffs knew of the facts giving rise to a malpractice claim close to the time they occurred, but did not recognize them as such. In such circumstances, the statute will have run unless another tolling provision applies. For that reason, relying on the discovery rule to calculate the statute of limitations can be dangerous.

Actual injury

Even if the client has discovered the facts constituting the lawyer’s negligence, the statute is tolled until the client has sustained “actual injury.” (Code Civ. Proc., § 340.6, subd. (a)(1).) The term “actual injury” in section 340.6 refers to “damages that could establish a cause of action

for legal malpractice.” (*Samuels v. Mix* (1999) 22 Cal.4th 1, 11.)

Section 340.6 was intended to codify *Budd v. Nixen* (1971) 6 Cal.3d 195. In *Budd*, the California Supreme Court held that “actual injury” occurs when “the client suffers appreciable harm as a consequence of his attorney’s negligence.” (*Id.* at 200-01.) In contrast, “[t]he mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm – not yet realized – does not suffice to create a cause of action for negligence,” and does not rise to the level of actual injury. (*Ibid.*)

Actual injury is generally a question of fact, but if the material facts are undisputed, the court may decide when actual injury occurred as a matter of law. (*Adams v. Paul* (1995) 11 Cal.4th 583, 585-86.) If the representation ended over a year ago, but there is a colorable argument that actual injury first occurred within the past year, it may be possible to survive a demurrer. However, depending on the facts developed in discovery, the case could later be vulnerable to a summary judgment motion.

Tolling during continuing representation regarding the same specific subject matter

Arguably the most important tolling provision is continuing representation by the defendant attorney. Subdivision (a)(2) of section 340.6 tolls both the one-year and four-year limitations periods so long as “[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.”

One of the first pieces of information to gather from a potential legal malpractice plaintiff is when the defendant attorney’s representation of the client ended. If it ended more than one year ago, the statute of limitations has likely expired, unless another exception applies.



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If the representation ended less than one year ago, however, the limitations period likely has not expired, due to the tolling provision embodied in section 340.6, subdivision (a)(2).

The continuing representation tolling provision requires analysis of when the underlying representation ended. This can be a fact-intensive inquiry, and a full discussion is beyond the scope of this article. However, some issues to look for include: Was a substitution of attorney filed, or motion to withdraw granted, ending the representation, and if so, when? Did the client write to the attorney, instructing them to stop all work? Did the attorney write to the client ending the representation? If there are invoices, what is the date of the last work the attorney billed for? What is the last date the attorney filed a pleading with the court, or sent correspondence on the client's behalf? Additionally, a recent State Bar opinion held that while an attorney continued to hold client funds, the attorney continued to represent the client. (*Matter of Jones*, No. 16-O-17503, 2022 WL 594175, at *8 (Cal. Bar Ct. Feb. 11, 2022).) These are a few factors that can be used to establish that the representation lasted through at least a particular date.

Duty and breach

It is no surprise that to succeed in a legal malpractice case, the plaintiff must prove that the defendant attorney breached the standard of care owed to the plaintiff. In California, an attorney owes the client a duty "to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." (*Kirsch v. Duryea* (1978) 21 Cal.3d 303, 308.)

Identifying breaches of an attorney's duty can be straightforward or more nuanced in complex areas of law. Failing to file a lawsuit before the statute of limitations expires is a classic example of breach, and no expert testimony is typically needed to prove breach in cases involving missed filing deadlines or similarly clear

failures of an attorney. When a case involves underlying legal issues, it will be necessary to retain an expert in the relevant area of law to opine as to the applicable standard of care and whether it was met. (See *Wright v. Williams* (Ct. App. 1975) 47 Cal.App.3d 802, 810-11.)

Proving the breach alone is not sufficient, however. Once the breach is identified, it is necessary to determine what, if any, damage the breach caused. Did the breach cause the client to lose the underlying case, to settle a case for less than it was worth, to suffer losses in a business transaction, or some other damage? As discussed below, it is critical to prove that the breach caused damage, even in cases of clear breach.

Causation

Proving liability in a legal malpractice case frequently turns on proving causation: "that 'but for that negligence a better result could have been obtained in the underlying action.'" (*Piscitelli v. Friedenbergl* (2001) 87 Cal.App.4th 953, 973.) When the underlying legal matter is a litigation matter, this means that the legal malpractice plaintiff must prove both (1) the legal malpractice case against the defendant attorney, and (2) that, but for the breach, it is more likely than not that the plaintiff would have obtained a more favorable result. This is referred to as proving the "case-within-the-case," and it impacts every phase of litigating a legal malpractice action. (See *Mallico Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 832.)

In legal malpractice actions arising out of underlying transactional representations, the plaintiff faces a similar causation burden. In such cases, the plaintiff must prove that, but for the defendant attorney's negligence, it is more likely than not that the plaintiff would have obtained a more favorable result. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244.)

In assessing whether to accept a legal malpractice case, an attorney must

evaluate not only the strength of the case against the defendant attorney, but also the strength of the underlying case. If there is a clear breach of the standard of care by the defendant attorney, but the breach did not cause harm to the plaintiff, the plaintiff will be unable to prove causation, and therefore unable to prove liability. (See *Mallico*, 52 Cal.App.4th at 834 [case-within-a-case "is a standard of proof designed to limit damages to those actually caused by a professional's malfeasance"].)

The "but-for" causation analysis is critical in evaluating legal malpractice cases. For example, if the defendant attorney failed to timely designate expert witnesses in the underlying case, the "but-for" analysis asks whether the plaintiff would have obtained a better outcome in the underlying case had experts been timely designated. If the plaintiff lost on a ground unrelated to experts, then there may be no causation with respect to the failure to designate experts; conversely, if the lack of experts caused the plaintiff to lose at trial (or to accept a low-value settlement to avoid a trial loss), causation would be satisfied.

Even a case involving a clear-cut breach such as a missed statute of limitations may pose a causation problem if the underlying case lacked merit or had low damages; in that situation, it would be difficult to prove that damages resulted from the breach.

Importantly, defendants sometimes overstate the burden imposed on the plaintiff by the case-within-a-case causation standard. Attorneys sometimes argue that the plaintiff must re-try the entire underlying case, but that is not always true. Depending on the malpractice and resulting damage alleged, it may be necessary only to re-prove a particular aspect of the underlying case. For instance, if an attorney prevailed in the underlying case but negligently handled an attorneys' fee motion, it may be necessary only to reprove the attorneys' fee motion and prove that a better result



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would have been achieved absent the malpractice. Similarly, it may be necessary only to reprove one particular claim, or one particular item of damages, such as emotional distress. As the court stated in *Viner*, all that is needed is to prove that, but for the malpractice, the client would have obtained a more favorable result. (*Viner*, 30 Cal.4th at 1244.)

Because of the case-within-a-case causation standard, evaluating legal malpractice cases requires evaluating not just the negligence of the defendant attorney, but also the merits of the underlying matter.

Damages

Plaintiffs in legal malpractice actions may recover economic damages caused by the attorney’s wrongful conduct. Emotional distress damages are generally unavailable in legal malpractice cases. (See *Smith v. Superior Ct.* (1992) 10 Cal.App.4th 1033, 1040; *Camenisch v. Superior Ct.* (1996) 44 Cal.App.4th 1689, 1695.) There are a few exceptions to the rule against emotional distress damages, such as when an attorney’s malpractice causes a client to be wrongfully incarcerated, or to lose custody of a child, but those exceptions are beyond the scope of this article.

Recoverable economic damages include the difference between the financial result the client obtained in the underlying case, and the financial result

they would have obtained absent the defendant’s malpractice. Another component of recoverable economic damages is mitigation costs. If the plaintiff had to hire another attorney to attempt to correct the errors of the defendant attorney, the fees and costs incurred by the second attorney are recoverable damages. (See *Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 582.)

Conclusion

A thorough analysis of the factors discussed above provides a solid foundation for assessing legal malpractice cases. Sometimes, however, after considering the factors described above, it may still be unclear whether the elements of breach and causation are satisfied, particularly in highly specialized practice areas. In those circumstances, it can be helpful to consult with an expert in the relevant practice area to determine whether the defendant attorney adhered to the standard of care and, if not, whether the attorney’s breach likely caused the potential client’s damage.

Finally, consider reviewing the retainer agreement between the potential client and the defendant attorney to determine whether there is an enforceable arbitration agreement or any other relevant provisions, such as a prevailing party attorneys’ fee provision. Doing so, combined with consideration of the issues

discussed in this article, will allow an attorney to make an informed evaluation of a legal malpractice case.



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