Ten Questions to Ask Before Taking a Legal-Malpractice Case, *Illinois Bar Journal*

Practice Tips

Suing another lawyer is rarely easy; will it really be worth it? Here are questions you should ask yourself before bringing on a legal-malpractice suit.

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By David J. Fish

"If you wouldn't take the underlying action, refuse the legal-malpractice case upon which it's based."

More and more legal-malpractice cases are being filed these days, but make no mistake; suing another lawyer is fraught with potential pitfalls.

At first blush, legal malpractice looks like most any other tort. To prevail, a plaintiff must prove (1) an attorney-client relationship, (2) a negligent act or omission that breached a duty the attorney owed the client, (3) proximate cause establishing that but for the negligence the plaintiff would not have been injured, and (4) damages. *Cripe v Leiter*, 291 Ill App 3d 155 (3d D 1997).

But these basic elements may be especially hard to satisfy in the legal-malpractice setting. This article identifies 10 factors to consider before accepting a legal-malpractice case.

1. Are you ready for the trial within a trial? An attorney files a lawsuit after the statute of limitations expires in a wrongful death case where the victim was hit by a speeding car. A clear case of legal malpractice? No.

As in all tort cases, a lawyer's misconduct must have caused damage and, therefore, a legal-malpractice plaintiff must prove that but for the negligence, he or she would have won the underlying case.

In other words, when you accept a legal-malpractice case, you really accept two cases. You must prove that (1) the lawyer was negligent and (2) your client would have won but for such negligence. See, e.g., *Cook v Gould*, 109 Ill App 3d 311 (3d D 1982). Thus, even if the defendant breached the standard of care by not filing an action within the statute of limitations, if your client cannot establish that the underlying case was meritorious, no damages are shown and no recovery is available. *Nika v Danz*, 199 Ill App 3d 296 (4th D 1990).

Practically, the "trial within a trial" may mean twice as much work as in a typical tort case. What happens when it turns out the victim was drunk and ran out in the middle of the street at night while wearing all black clothing... and that the driver was filing bankruptcy and had no insurance? It's likely that the wrongful death case was a loser; and so is your legal-malpractice case.

When considering whether to accept a legal-malpractice case, review the underlying case as if it were a separate lawsuit. If you would not take the underlying action, refuse the legal-malpractice case predicated upon it.

2. Was the prospective defendant negligent or simply wrong? Clients can end up on the losing end of a lawsuit or be given wrong advice in a transactional setting, yet have no recourse against their lawyers. Lawyering is a strategic art. When strategizing or rendering an opinion, lawyers weigh conflicting case law, experiences with particular judges, budgetary concerns, politics, and many other factors. In so doing, they can err without being negligent.

Ordinary tort rules govern legal malpractice. This means an attorney is liable to a client for damages only when failing to exercise a reasonable degree of care and skill. The "law distinguishes between errors of negligence and those of mistaken judgment." See *Brainerd v Kates*, 68 Ill App 3d 781, 785 (1st D 1979).

Indeed, "[c]riticism in hindsight of one of many courses of action is not probative of negligence and the mere opinion by a particular attorney that the defendant's course of action [was] not the same as that which the expert [attorney] might have chosen is not testimony probative of malpractice." *Goldstein v Lustig*, 154 Ill App 3d 595, 600 (1st D 1987). Essentially, Illinois courts have created an attorney-judgment rule that insulates lawyers from the Monday-morning-quarterback lawsuit.

The attorney-judgment rule is applicable in transactional settings as well, especially when the alleged negligence is based on representation provided in a new area of the law. For instance, in *Brown v Gitlin*, 19 Ill App 3d 1018 (1st D 1974), an attorney was sued for not properly reporting a stock sale. The court noted that until the litigation that ensued from the underlying transaction occurred, there was not a clear answer as to whether such a transaction even required a reporting. The court found that the "error by the attorney [did] not constitute malpractice." Id, 19 Ill App 3d at 1021.

The bottom line: be wary of any case based on an allegation that a lawyer made a tactical or strategic error or provided erroneous counsel in a new area of the law.

3. Has the statute of limitations run? Ordinarily, regardless of whether they're brought in tort or contract, attorney malpractice lawsuits must be filed within two years from the time the client knew or reasonably should have known of the injury for which damages are sought. 735 ILCS 5/13-214.3(b). Illinois law also has a repose period of six years after the date on which the act or omission occurred. 735 Ill 5/13-214.3 (c).

Time limitations can be tricky in malpractice cases, because legal work is often done over time. Unlike some states, Illinois does not have a "continuous representation rule" that tolls the statute of limitations until representation is complete. *Witt v Jones & Jones Law Offices, P.C.*, 269 Ill App 3d 540 (4th D 1995). Therefore, you must look carefully to determine whether the negligent conduct is still actionable. And don't allow the statute of limitations to run against the malpractice case you're considering, lest you become a malpractice defendant.

4. Is the case financially worth bringing? Even when liability and damages are clear, consider the time it will take to prevail. Lawyers are often less likely to settle because they do not like to be wrong. This means that you may be in for a long and bitter battle. To quote *Ally McBeal's* Richard Fish (who is no relation to the author, by the way):

New firm policy, listen up! Anybody who sues this firm or me, personally, we all drop whatever cases we are working on. We devote all of our intellectual and creative efforts to ruining that person's life. Are we clear? I don't want to stop short with just getting even. Retribution is not strong enough. Ruin, that is the goal. Irreversible, irreputable, irrational ruin!

Beyond your valuable time, consider the expense of a legal-malpractice suit, including the cost of discovery and of hiring an expert to testify to breach of the standard of care. *Barth v Reagan*, 139 Ill 2d 399, 407 (1990) ("Failure to present expert testimony is usually fatal to a plaintiff's legal malpractice action").

Also consider that damages are limited. The General Assembly has prohibited punitive damages in legal-malpractice cases, 735 ILCS 5/2-1115. There has been a debate about whether emotional distress damages are recoverable. (See *Horn v Croegaert*, 187 Ill App 3d 53, (5th D 1989) and *Hanumadass v Coffield, Ungaretti & Harris*, 311 Ill App 3d 94 (1st D 1999).)

An often over-looked element of damage in legal-malpractice cases is the cost of fees proximately caused by a lawyer's negligence. To the extent that legal fees were incurred as a direct result of the underlying malpractice, they are recoverable. E.g., *Goran v Glieberman*, 276 Ill App 3d 590, 595, 659 NE2d 56, 60 (1st D 1995).

5. Are you getting the full story from your prospective client? Some disappointed clients, looking for ways to blame their lawyers, will tell less than the full story. A detailed review of the attorney's file may reveal facts that the client has not communicated. Consider requiring potential clients to request their files from the former attorney. Although time-consuming, taking this step can help you avoid a baseless claim.

6. Is it just malpractice; or is it more? The General Assembly has prohibited certain categories of damages against lawyers for malpractice. However, this limitation only applies to lawyers acting as lawyers. When lawyers take off their attorney hats, the potential liability is much greater. If the circumstances so warrant, don't feel constrained to only bring a malpractice action. If your investigation reveals more than a breach of the standard of care, other causes of action might allow for substantially more categories of damages, including punitive damages. Jeanna D. Chappell, *When Are Punitive Damages Awarded in Malpractice and Other Suits by Clients Against Lawyers?,* 24 J Legal Prof 385 (2000).

Fortunately for most lawyers, but unfortunately for plaintiff malpractice lawyers, the Illinois Supreme Court has refused to apply the Consumer Fraud and Deceptive Practices Act to the business aspect of practicing law; i.e., to legal services or billing for fees. *Cripe v Leiter*, 184 Ill 2d 185, 703 NE2d 100 (1998). The plaintiff in *Cripe* sued an attorney under the Consumer Fraud Act for deceptive billing practices. While the third district found that the Act did apply to "commercial aspects" of a law practice such as billing, the Illinois Supreme Court disagreed and held "the legislature did not intend the Consumer Fraud Act to apply to regulate the conduct of attorneys in representing clients." Id, 184 Ill 2d at 199.

Still, when an investigation reveals serious misconduct, consider bringing other causes of action that can allow greater damages than a malpractice suit. These include tortious interference, civil conspiracy, fraud, Racketeer Influenced and Corrupt Organizations Act (RICO), and conversion actions.

7. Will you make too many enemies in your legal community? Many attorneys resent lawyers who sue other lawyers (see number 4 above). Especially if you're part of a small legal community, you might want to refer a potential legal-malpractice case to an outside law firm.

8. Will your client turn on you? Clients willing to sue their former lawyers might well have a general distrust of the legal profession and might try to sue you if they're not happy with the result of the malpractice lawsuit. Deal with this risk head-on by being clear and candid in expressing your feelings about their case.

9. Have you met your reporting responsibilities under *Himmel*? Pursuant to *In re Himmel*, when conduct crosses the line from negligence to some types of misconduct, lawyers have a reporting obligation. *In re Himmel*, 125 Ill 2d 531 (1988).

Himmel requires reporting serious misconduct involving "dishonesty, fraud, deceit or misrepresentation, or that constitutes a criminal act reflecting adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." Thomas P. Sukowicz, *The Himmel Duty: Observations By An ARDC Lawyer*, 11 CBA Record 16 (Nov 1997). If reporting is warranted, you should do so in a manner consistent with your duty to represent your malpractice client.

10. To whom did the prospective defendant owe a duty? Usually the existence of a duty is straightforward in a legal-malpractice case. However, the duty prong can become complicated when a third-party is involved.

For many years under common law, attorneys did not owe a duty to nonclients except in cases of fraud or collusion. See *Wilson v Wilson*, 1993 WL 54533 (ND Ill). Today, however, Illinois recognizes that an attorney typically owes a duty to a nonclient third party who proves that "the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party." *Pelham v Griesheimer*, 92 Ill 2d 13 (1982).

Thus, a borrower's attorney who certified incorrectly to a lender that the borrower's farm machinery was free of encumbrances was held liable to the third-party lender. As Judge Posner stated, where "the defendant makes the negligent misrepresentation directly to the plaintiff in the course of the defendant's business or profession, the courts have little difficulty in finding a duty of care." *Greycas, Inc. v Proud*, 826 F2d 1560 (7th Cir 1987) (applying Illinois law).

However, some Illinois courts have defined this duty to third parties narrowly. For example, in *First National Bank v Califf, Harper, Fox & Dailey*, 193 Ill App 3d 83 (3d D 1989), the plaintiff bank agreed to give a small business loan if the Small Business Administration would guarantee the loan. The SBA agreed to guarantee the loan if the borrowers gave a second mortgage on their house as security. An attorney at the defendant law firm allegedly was negligent in his preparation of the mortgage documents and, when the borrowers subsequently filed for bankruptcy, the mortgage was declared invalid. The SBA demanded reimbursement of the guarantee from the plaintiff bank because the plaintiff failed to meet the loan requirement that there be a second mortgage on the borrower's home.

The plaintiff bank then filed an action against the borrower's attorneys alleging negligence in preparing the mortgage. The court found that no duty was owed to the bank because the "primary and direct reason" that the borrowers retained the law firm was to assist them in obtaining a loan so they could "keep their business afloat." Accordingly, the court ruled that a borrower's attorney did not owe a duty to a lending bank when preparing the mortgage document necessary to obtain an SBA loan guarantee.

Thus, when a third-party was damaged by an attorney's conduct, you must do a close analysis to determine if a duty was even owed.