TIPS FOR AVOIDING LEGAL MALPRACTICE

STATE AND FEDERAL APPEALS

CONTINUING LEGAL EDUCATION SEMINAR

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Legal malpractice claims are on the rise. As several studies have shown, since 1960, there has been a significant increase in legal malpractice claims. Mallen and Smith, Legal Malpractice, Vol. 1 p. 22 Ed., Thompson West (2005 Ed.).

As an attorney who defends lawyers in legal malpractice cases, I can attest that, in Texas since 1988, there has been a significant increase in the number and severity of legal malpractice claims. It is my belief that one reason for this increase is that, based upon tort reform legislation, it is much harder to sue doctors. This has led many plaintiffs' attorneys, who used to sue doctors, to look to sue other professional targets such as lawyers, accountants and architects.

It is also my belief that the advent of the internet has led to an increase in the number of legal malpractice claims. If you do a Google search of Dallas legal malpractice lawyers, you will find approximately 10 web sites put up by attorneys who are obviously looking for plaintiff legal malpractice cases. The same is true if you do a similar search for Houston. In many of these web sites, the soliciting lawyer provides an expansive description of the fiduciary duty a lawyer owes his client. In many of these web sites, a soliciting lawyer asks whether the reader has been injured by his lawyer. Many of these web sites contain links by which the reader can send the soliciting lawyer an email describing the potential claim.

I. Legal Malpractice Claims Arising Out of Actions Lawyers Take On Appeals

In Texas, if a plaintiff sues an attorney for legal malpractice, he must prove the following elements:

1) that the attorney owed the plaintiff a duty;

2) that the attorney breached that duty;

3) that this breach of duty caused the plaintiff injury; and

4) that damages have occurred.

Cosgrover c. Grimes 774 S.W. 2d S.W. 2d 662, 665 (Tex. 1989).

As a general rule, concerning malpractice claims, Texas has a bright line priority rule. This means that, as a general rule, only an attorney's client can sue the attorney for negligence. Barcelo v. Elliott. 923 S.W. 2d 575, 577 (Tex. 1996). In other words, due to the lack of privity, as a general rule, non-clients cannot sue an attorney for legal malpractice because an attorney does not owe a non-client a duty to use reasonable cure.

To establish that the attorney breached his duty to the client, the client must show that the attorney's actions breached the standard of care for a "reasonably prudent attorney." As discussed below, this generally is a fact questions which is tried to a jury.

When the alleged legal malpractice occurred in the attorney's representation of a client in an underlying case, the client has to prove that, but for the attorney's negligent representation, the client would have prevailed in the underlying case. "When a legal malpractice case arises from prior litigation, the plaintiff has the burden to prove that 'but for' the attorney's breach of duty, he or she would have prevailed in the underlying cause of action and would have been entitled to judgment." *Greathouse v. McConnell,* 982 S.W.2d 165, 172 (Tex.App.—Houston [1st Dist.] 1998, pet denied). This causation requirement is often referred to as the "suit within a suit" requirement. *See Tommy Gio, Inc. v. Stacy Dunlop,* 348 S.W.3d 503, 507 (Tex.App.—Dallas 2011, pet. denied). ("When the plaintiffs allegation is that some failure on the attorney's part caused an adverse result in prior litigation, the plaintiff has to prove that, but for the attorney's negligence, he would have prevailed in the underlying case. Appellate court opinions often refer to this causation aspect of the plaintiffs burden as the 'suit within a suit' requirement.").

Thus, in a basic legal malpractice claim arising out of a defendant attorney's handling of a prior lawsuit:

1) the plaintiff client must prove that his attorney was negligent in handling the underlying case;

and

2) the plaintiff client must prove that, but for the attorney's negligence, the plaintiff client would have prevailed in the underlying case.

Both of these matters are generally issues of fact that must be tried to a jury.

The legal malpractice proximate cause standard is different in cases of alleged appellate legal malpractice. Instead, "in cases of appellate legal malpractice, where the issue of causation hinges on the possible outcome of an appeal, the issue is to be resolved by the Court as a question of law." Millhouse v Wiesenthal 775 S.W. 2d 626, 628 (Tex. 1989).

This Millhouse case is the seminal case on this issue of causation in appellate legal malpractice cases. In Millhouse, a Land Buyer bought a piece of land from the Land Seller for $80,000. The Land Buyer then discovered that there was a $ 214,000 lien on the property.

So, in the underlying case, the Land Buyer sued the Land Seller for fraud for failing to disclose this lien. The Defendant Attorney represented the Land Seller in this underlying case.

The underlying case was tried to the Court. The Court found that the Land Seller had committed fraud and the Court awarded damages to the Land Buyer.

The Land Seller then directed that the Attorney Defendant appeal the case. So the Defendant Attorney (i) gave timely notice of the appeal, (ii) ordered the clerk's record and (iii) requested that the court reporter prepare the reporter's record.

Title search: Tips for Avoiding Legal Malpractice

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