

1979

## Recognizing and Defining Legal Malpractice

Ronald E. Mallen

*Long & Levitt (California)*

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Ronald E. Mallen, Recognizing and Defining Legal Malpractice, 30 S. C. L. Rev. 203 (1979).

This Symposium Paper is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

## RECOGNIZING AND DEFINING LEGAL MALPRACTICE

RONALD E. MALLEN\*

Although virtually every American jurisdiction has recognized that attorneys may be liable for legal malpractice,<sup>1</sup> a party contemplating such an action might encounter reluctance by attorneys to sue a fellow member of the bar.<sup>2</sup> The risk of such a "conspiracy of silence" is not great, however, because of the attorney's ethical obligation to provide legal services to those who have been wrongly injured. The American Bar Association's former Canons of Ethics provided in part, "Lawyers . . . should accept without hesitation employment against a member of the Bar who has wronged his client."<sup>3</sup> Similarly, the present Code of Professional Responsibility states, in part, "The personal preference of a lawyer to avoid adversary alignment against . . . other lawyers . . . does not justify his rejection of tendered employment."<sup>4</sup> The courts have not been overly receptive to legal malpractice claims and surprisingly little judicial guidance can be found on the elements of the tort. But, despite resistance by members of the profession, adverse treatment by the courts, and the lack of judicial guidance, legal malpractice claims are becoming a significantly increasing reality for the practicing attorney.<sup>5</sup>

Recently, it has been popular to talk of the impending malpractice and insurance crisis. This has produced a flurry of

---

\* Member, California State Bar; partner, Long & Levit.

1. To date, only Wyoming has not reported appellate decisions involving damage actions against attorneys for negligence. See R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* 631-60 (1977) [hereinafter cited as MALLEN & LEVIT]. The forthcoming supplement to that book will note that, since the 1977 publication, the Idaho Supreme Court has decided *Martin v. Clements*, 98 Idaho 906, 575 P.2d 885 (1978).

2. See ABA COMM. ON PROFESSIONAL ETHICS, *OPINIONS*, No. 144 (1935) (noting difficulty of obtaining legal representation for a claim against an attorney).

3. ABA CANONS OF PROFESSIONAL ETHICS No. 29.

4. ABA CODE OF PROFESSIONAL RESPONSIBILITY, *ETHICAL CONSIDERATION* No. 2-28. The change in the form of stating the ethical obligation may be, in part, because of the increased probability that attorneys will be faced with this problem.

5. In 1973, malpractice claims were filed against only about .5% of attorneys nationwide. This figure increased to 6% in 1976 and was projected to be 8% in 1977. 1 *PROFESSIONAL LIABILITY REP.* 185-86 (May 1977). From the dates given, it can be seen that this projection is now outdated. The point is that legal malpractice claims are increasing at a rapid rate. No national data bank of statistics has been established from which one can gather accurate and up-to-date statistical information on legal malpractice claims. The percentage figures used in this preface are based on estimates provided to the author by various insurance companies.

suggestions about how to solve or avoid malpractice, as well as proposed alternatives to private insurance.<sup>6</sup> Avoiding malpractice claims, which this symposium addresses, must necessarily start with an understanding of what constitutes legal malpractice.

The phrase “legal malpractice” is commonly used to describe a kind of tortious conduct, but there is little agreement on, or even discussion of, the meaning of the phrase. Some early decisions have offered a sinister-sounding definition in proposing that “malpractice as a lawyer means evil practice in a professional capacity, and the resort to methods and practices unsanctioned and prohibited by law.”<sup>7</sup> Subsequent decisions have explained that this definition was intended to describe only wrongs that affected the court, rather than wrongs to the client.<sup>8</sup> Other definitions that can be found usually are descriptions of the kind of conduct contemplated by a statute of limitations that refers generally to “malpractice.”

Legal malpractice can be defined. That definition may be either theoretical or practical. The former approach may be useful to legislators, writers, lecturers, scholars, and others who need a theoretically consistent basis for communication. The latter approach is more meaningful to the practitioner since it identifies those types of liability claims that, regardless of merit, hazard the practice of law.

#### DEFINITIONS — A THEORETICAL APPROACH

The theoretical approach requires the identification of those bases of liability that are unique to and arise out of the rendition of professional services.<sup>9</sup> The test for distinguishing malpractice from other wrongs is whether the wrong primarily concerns the *quality* of the legal services. Therefore, actual fraud by an attorney would not be considered legal malpractice since such conduct

---

6. For a summary of the alternative mechanisms, see ABA SPECIAL COMMITTEE ON LAWYERS PROFESSIONAL LIABILITY, *LEGAL MALPRACTICE INSURANCE: A PRIMER FOR THE ORGANIZED BAR* 107-53 (1977) [hereinafter cited as PRIMER].

7. *In re Baum*, 62 N.Y. Sup. Ct. 611, 8 N.Y.S. 771 (1890).

8. *E.g.*, *Strauss v. New Amsterdam Cas. Co.*, 30 Misc. 2d 345, 347, 216 N.Y.S.2d 861, 864 (1961).

9. A similar approach is taken by professional liability insurers. Although practices vary among insurers, they consistently afford coverage for “acts, errors or omissions arising out of professional services rendered in the insured’s capacity as a lawyer.” PRIMER, *supra* note 6, at 25. The liability insurance definition may encompass more wrongs than the theoretical definition offered in the text since this insurance is intended to give broad protection to lawyers who face a wide range of hazards.

is neither unique to the legal profession nor does it necessarily concern the quality of professional services any more than does dishonesty by a layman. Similarly, an action for breach of an express contract would not be malpractice since the wrong is the failure to perform a promise rather than a deficiency in the quality of services.

On the other hand, clearly within the definition of legal malpractice is the negligent rendition of professional services. The courts agree that "legal malpractice" encompasses liability for negligence.<sup>10</sup> That wrong is sometimes alternatively stated in terms of an implied contract to exercise ordinary skill and knowledge, corresponding to the standard of care used to evaluate competence.<sup>11</sup> To that extent the attorney's liability is comparable to that of other professionals.

The attorney's malpractice exposure differs from other professionals, however, because liability may also be based on a breach of the fiduciary obligations, such as an unauthorized disclosure of the client's confidence<sup>12</sup> or the representation of adverse or conflicting interests.<sup>13</sup> Among professionals, only attorneys are commonly sued for breaches of fiduciary obligations.

Some courts seem to distinguish a breach of the fiduciary obligations from legal malpractice.<sup>14</sup> But, the prevailing and more reasonable view is that legal malpractice encompasses any professional misconduct whether attributable to a breach of the standard of care or of the fiduciary obligations. In recognition of the dual bases of an attorney's liability, some courts have referred to the fiduciary obligations as setting forth a standard of

10. *Universal Film Exchanges, Inc. v. Lust*, 479 F.2d 573 (4th Cir. 1973); *Long v. Bowersox*, 8 Ohio N.P. (n.s.) 249 (1909). See also *Cordial v. Grimm*, 346 N.E.2d 266 (Ind. App. 1976).

11. *Bucquet v. Livingston*, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976); *Ventura County Humane Soc'y for P.C.C.&A., Inc. v. Holloway*, 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 (1974); *Floro v. Lawton*, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98 (1960); *Brackett v. Norton*, 4 Conn. 517 (1823); *Weekly v. Knight*, 116 Fla. 721, 156 So. 625 (1934); *Kartikes v. Demos*, 214 So. 2d 86 (Fla. Dist. Ct. App. 1968); *Rooker v. Bruce*, 45 Ind. App. 57, 90 N.E. 86 (1909); *Thomas v. Schee*, 80 Iowa 237, 45 N.W. 539 (1890); *Roehl v. Ralph*, 84 S.W.2d 405 (Mo. Ct. App. 1935); *Peters v. Simmons*, 87 Wash. 2d 400, 552 P.2d 1053 (1976).

12. See, e.g., *Lakoff v. Lionel Corp.*, 207 Misc. 319, 137 N.Y.S.2d 806 (1955). For a discussion of liability based on breach of fiduciary obligations, see generally MALLEN & LEVIT, *supra* note 1, at §§ 91-103.

13. See, e.g., *Fielding v. Brebbia*, 399 F.2d 1003 (D.C. Cir. 1968). See generally MALLEN & LEVIT, *supra* note 1, at §§ 95, 99.

14. See *Green v. Zukernick*, 133 So. 2d 442 (Fla. App. 1961); *Vessel v. St. Paul Fire & Marine Ins. Co.*, 276 So. 2d 874 (La. App. 1973).

“conduct.”<sup>15</sup> Thus, under the theoretical approach legal malpractice may be defined as a breach by an attorney of either the standard of care or of the standard of conduct.

### DEFINITIONS—A PRACTICAL APPROACH

The practical approach to defining legal malpractice requires examination, analysis, and cataloging of the types of claims that are being asserted against lawyers. It is beyond the scope of this preface to give a detailed analysis of particular fact situations that can form the substantive basis of a claim. But a synthesis and classification of those claims into recognizable categories can alert the practitioner to areas where he may find himself exposed to malpractice liability. Such a review not only provides insight into the nature of the claims being asserted, but also indicates some of the reasons for legal malpractice claims.

*Adversary-Nonclient.*—One very significant area of exposure that does not fall within the proposed theoretical definition consists of claims not concerning a deficiency in the quality of the attorney’s services rendered to the client,<sup>16</sup> but rather an injury caused to a third party *because of* the attorney’s representation. This category includes tort claims that may be filed against an attorney, as well as claims arising from various statutes, most notably in the area of securities regulation. Reported appellate decisions and insurance company statistics disclose that claimants in this third party category constitute approximately twenty percent of those persons who sue attorneys.

Most of these plaintiffs allege intentional torts, such as malicious prosecution,<sup>17</sup> abuse of process,<sup>18</sup> infliction of emotional distress,<sup>19</sup> defamation,<sup>20</sup> interference with an advantageous relationship,<sup>21</sup> and a series of other tort theories predicated upon the

---

15. *E.g.*, *Palfy v. Rice*, 473 P.2d 606 (Alaska 1970); *Bank of Mill Creek v. Elk Horn Coal Corp.*, 133 W. Va. 639, 57 S.E.2d 736 (1950).

16. The erosion of the privity of contract requirement has permitted those persons who were not clients but who were intended to benefit by the attorney’s services to sue the attorney for malpractice. *See, e.g.*, *Donald v. Garry*, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971); *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962). *See generally* MALLEN & LEVIT, *supra* note 1, at §§ 57, 59.

17. *See, e.g.*, *Carroll v. Kalar*, 112 Ariz. 595, 545 P.2d 411 (1976).

18. *See, e.g.*, *Four Star Stage Lighting, Inc. v. Merrick*, 56 A.D.2d 767, 392 N.Y.S.2d 297 (1977).

19. *E.g.*, *Grimm v. Bam*, 22 Misc. 2d 982, 195 N.Y.S.2d 36 (1959).

20. *E.g.*, *Sampson v. Rumsey*, 1 Kan. App. 2d 191, 563 P.2d 506 (1977).

21. *E.g.*, *Bledsoe v. Watson*, 30 Cal. App. 3d 105, 106 Cal. Rptr. 197 (1973).

manner in which the attorney represented his client.<sup>22</sup> The suits are rarely successful since, with the exception of malicious prosecution, the attorney has available a number of absolute and qualified privileges.<sup>23</sup> These claims are often concluded at the pleading stage. Even if tried, successful prosecution requires proof of a type of intentional conduct tantamount to malice. Experience discloses that an attorney's actions, even if seemingly hostile to the adverse party, are at worst attributable to overly zealous representation of the client's interests rather than to any ulterior or sinister motive. This kind of mental state usually does not, and should not, suffice as the malice required for liability. Unfortunately, lack of success by plaintiffs has not diminished the frequency of such actions.

Various statutes also provide causes of action for nonclient plaintiffs. A frequently used statute is the Civil Rights Act of 1871,<sup>24</sup> which almost invariably fails as the basis for a cause of action since an attorney does not normally act under "color of law."<sup>25</sup> Yet, regardless of whether such actions are successful, they must be defended at a significant expense, and they do constitute an occupational hazard for attorneys.

Monetarily, the statutes posing the greatest financial exposure to attorneys are the federal securities laws, particularly the Securities Act of 1933,<sup>26</sup> the Securities and Exchange Act of 1934,<sup>27</sup> and corresponding state blue sky laws. Statistically, claims based on these statutes constitute only two to three percent of all actions filed against attorneys. Yet, few lawsuits against attorneys routinely approach the judgment exposure and defense costs of securities litigation.<sup>28</sup> Major securities litigation often involves claims aggregating in excess of \$10 million with defense expenditures not infrequently exceeding a million dollars. Unfavorable experience by insurers with securities litigation has

---

22. For a discussion of various theories of recovery that have been used against attorneys, see MALLEN & LEVIT, *supra* note 1, at §§ 45-52.

23. *E.g.*, *Lerette v. Dean Witter Organization, Inc.*, 60 Cal. App. 3d 573, 131 Cal. Rptr. 592 (1976). See generally MALLEN & LEVIT, *supra* note 1, at § 176.

24. 42 U.S.C. §§ 1981-1995 (1976). Most actions are based on §§ 1983 and 1985 of the statute.

25. See, *e.g.*, *Deas v. Potts*, 547 F.2d 800 (4th Cir. 1976); *Shelton v. Randolph*, 373 F. Supp. 448 (W.D. Va. 1974). See generally MALLEN & LEVIT, *supra* note 1, at § 80.

26. 15 U.S.C. § 77a-aa (1976).

27. *Id.* § 78a-kk.

28. For a full discussion of policies and procedures for avoiding malpractice liability in the securities field, see J. Smith, *Preventing Errors in Securities Transactions*, 30 S.C.L. Rev. 243 (1979).

seriously limited the availability of coverage for these claims and has influenced some insurers to withdraw from the professional liability field.<sup>29</sup>

*Fee Disputes.*<sup>30</sup>—A second major area of legal malpractice claims is that of cross-actions filed in response to actions by attorneys for fees. Although the frequency of these cross-actions is declining (perhaps because of an increased reluctance by attorneys to sue to recover their fees), some insurers have reported that within the last three years malpractice cross-actions filed in response to fee actions approximated twenty percent of all claims against attorneys.

Legal malpractice is a defense to an action for legal fees.<sup>31</sup> As a defense it can reduce or even totally eliminate the attorney's recovery of fees. The further contention that the client has sustained an actual injury can convert the claim into one for affirmative relief. The step from the elimination of the fee to the claim for affirmative relief is more than simply a matter of degree. A plaintiff then becomes a defendant. The attorney must notify his professional liability insurer and incur the usual, substantial deductible that applies to the cost of defense of a legal malpractice claim. Unquestionably, a cross-action for legal malpractice is a deterrent to pursuing an action for legal fees. It is coercive, and the psychological effect may result in a disadvantageous settlement of the fee claim. When such a cross-action is without merit, however, and is filed solely for tactical purposes, it becomes a form of malicious prosecution.<sup>32</sup> Angry attorneys who have successfully defended these claims are retaliating with malicious prosecution suits both against their former clients and those clients' attorneys.<sup>33</sup>

Although not filing an action for legal fees will avoid the risk

---

29. *E.g.*, St. Paul Fire & Marine Ins. Co. has withdrawn from the professional liability field. For an example of a possible incentive for this withdrawal, see *S.E.C. v. Nat'l Student Marketing Corp.*, 360 F. Supp. 284 (D.D.C. 1973).

30. See generally MALLEN & LEVIT, *supra* note 1, at § 12.

31. *E.g.*, *Felger v. Nichols*, 35 Md. App. 182, 370 A.2d 141 (1977). See generally MALLEN & LEVIT, *supra* note 1, at § 223.

32. See *Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1975).

33. Like the legendary Phoenix, malicious prosecution suits tend to reappear as another and a retaliatory malicious prosecution action. Theoretically, one such suit can give rise to infinite progeny. Although none of these retaliatory actions have yet reached the appellate stage, the writer has come into contact with them through his own experience, particularly through dealings with malpractice insurers. Retaliatory suits should be expected in legal malpractice cases in light of their frequency in medical malpractice cases.

of a cross-action for malpractice, the solution to the problem should more appropriately commence with the initial handling of the attorney-client relationship. Disputes over fees can and should be avoided. The origins of these claims are usually attributable to the failure to reach agreement on the basis for the fees and to provide the client with timely and adequate explanation of the services rendered.<sup>34</sup> As is true of most attorney-client problems, the origin is in poor communication. The skill and effort that has been put into a client's representation will not be appreciated at the time of billing unless it has been previously reported.

*Negligence in the Professional Relationship.*—Perhaps one-fourth or more of legal malpractice claims are due to negligence, not in the rendition of legal services, but in the handling of the attorney-client relationship.<sup>35</sup> The impression of the "neglectful" attorney is too often created by a failure in communication rather than a deficiency in the quality of services. Of course, the catalyst for the client's dissatisfaction is a result that is subjectively unsatisfactory. The client faults the attorney who he believes either caused the unfavorable result or failed to avoid it. Usually, the attorney's error is the failure either to adjust the client's expectations to the difficulty and reality of the legal problem or to communicate the quality of his efforts. Either error may turn out to be the only reason for the legal malpractice claim.

The prudent attorney will inform the client of those considerations that may seriously hinder achievement of the client's legal goals. The attorney who seeks to "comfort" the client with unrealistic assurances of success will most likely find that he has raised the client's expectations to a level that no lawyer could achieve, yet that will be the measure of his performance. The attorney who fails to inform the client of his efforts and success is not being modest but imprudent. Without this communication, the client is unlikely to be aware of the quality of representation. Too many clients end up believing that the good result occurred despite the attorney's efforts and the bad result occurred because of the attorney's inadequacies.

*Negligence-Errors.*—Negligence, of course, is the category generally associated with legal malpractice. The premise is that an attorney has committed an error that would have been avoided by the hypothetical "competent" attorney who comports with the

---

34. See, e.g., *Neville v. Davinroy*, 41 Ill. App. 3d 706, 355 N.E.2d 86 (1976).

35. See MALLEN & LEVIT, *supra* note 1, at § 17.



standard of care. Several articles in this symposium consider in detail the different kinds of errors that can lead to malpractice liability. But, a word of caution is in order at this point to those considering prosecution of a legal malpractice claim. Many actions against attorneys superficially appear to be justified, but upon closer analysis disclose deficiencies in the supposed existence of the legal malpractice cause of action. Many actions against attorneys are filed because of a documented error of judgment that injures the client. Yet, too many of these plaintiffs and their new attorneys fail to recognize that an error of judgment by an attorney is an issue different from, and irrelevant to, the determination of whether the attorney was negligent.<sup>36</sup> A legal malpractice action is unlikely to succeed when the attorney erred because an issue of law was unsettled or debatable.<sup>37</sup> The perfect vision and wisdom of hindsight is an unreliable test for determining the past existence of legal malpractice.

Yet, even if there was a negligent error, many lawsuits fail because of the absence of provable damage. A cause of action that would not have succeeded even if competently prosecuted cannot result in malpractice liability.<sup>38</sup> Similarly, a significant number of malpractice actions are destined for failure because of the inability of the client to show that even if a favorable judgment were recovered, there would have been a solvent defendant to pay it.<sup>39</sup>

Although errors and actual negligence may inspire legal malpractice suits, more is required for liability.

### CONCLUSION

In today's consumer-oriented society, litigation has become a common, if not an acceptable, means of vindicating believed wrongs and compensating supposed injuries. The increasing complexity of modern civilization with the accompanying specializa-

---

36. *Smith v. St. Paul Fire & Marine Ins. Co.*, 366 F. Supp. 1283 (M.D. La. 1973), *aff'd*, 500 F.2d 1131 (5th Cir. 1974); *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 269 So. 2d 239 (1972); *Meagher v. Kavli*, 256 Minn. 54, 97 N.W.2d 370 (1959); *Gimbel v. Waldman*, 193 Misc. 758, 84 N.Y.S.2d 888 (1948); *Rapuzzi v. Stetson*, 160 A.D. 150, 145 N.Y.S. 455 (1914); *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954); *Hill v. Mynatt*, 59 S.W. 163 (Tenn. Ct. App. 1900).

37. *But see Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (although the issue of law was actually debatable, the attorney had failed to conduct research to determine that fact).

38. *E.g.*, *Jones v. Wright*, 19 Ga. App. 242, 91 S.E. 265 (1917). *See generally* Annot., 45 A.L.R.2d 5, at 19 (1956).

39. *Id.*

tion of professionals appears to have raised the consumer's expectations for beneficial results. No longer is the public reluctant to question and challenge the competence of professionals. The attorney has not escaped the litigation plight of his contemporaries in other professions when those expectations are not realized.

Legal malpractice does exist and has not, and probably will not, be eliminated by the profession's self-regulation. The disciplinary mechanism was not designed to regulate the malpracticing attorney, but rather to deal with those wrongs that threaten the integrity of the attorney-client relationship. The disciplinary system has both prophylactic and punitive objectives, the latter often in an exemplary sense. But, that system is not concerned with the compensation of a client for an injury, indeed the complaining party need not have sustained damage.<sup>40</sup> Generally, the injured or complaining party is not even a party to the proceeding.<sup>41</sup>

In time, testing, licensing, formal specialization, continuing education, and relicensing are expected to raise the general level of competence in the profession. Legal malpractice suits may have a salutary effect. Self-protection is a strong incentive for improving both the administrative aspects of the practice of law as well as the quality of the attorney-client relationship.

As legal malpractice actions continue to hazard the practice of law, the manner in which lawyers respond may significantly alter the rules and philosophy by which we practice law. If that reaction is one of caution and introspection, the result is likely to be constructive, improving both the general competence of the profession and the quality of the attorney-client relationship. On the other hand, if the response is retaliatory litigation and self-protective legislation, the risk is to the very credibility and integrity of the profession. Prophecy aside, there are two certainties: (1) the frequency of legal malpractice claims will continue to increase, and (2) the profession will, somehow, be changed.

---

40. *E.g.*, *Athearn v. State Bar*, 20 Cal. 3d 218, 571 P.2d 628, 142 Cal. Rptr. 171 (1977).

41. *Slotnick v. Pike*, 370 N.E.2d 1006 (Mass. 1977). *See also Disbarment in the United States: Who Shall do the Noisome Work?*, 12 COLUM. J.L. & Soc. PROB. 1 (1975) (procedural practices in the different jurisdictions are given in chart form at 44-45).

