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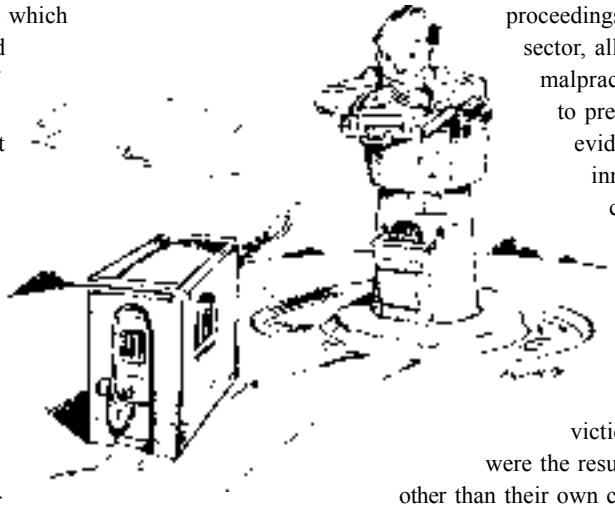
A newsletter from The ABA Standing Committee on Lawyers' Professional Liability

Double Standards - Civil and Criminal Legal Malpractice

by William B. McGuire and Marianne M. DeMarco

The elements of duty, breach, proximate causation and damage have been recognized, traditionally, as required proofs in malpractice actions arising from legal representation rendered in civil matters. When the alleged malpractice arises from the representation of a criminal defendant, however, courts of many jurisdictions have imposed one or more additional elements of proof to sustain a professional liability claim.

Most courts which have considered the elements of proof in a legal malpractice suit arising from criminal representation have held that, in order to state an actionable claim, there must be evidence of a successful post-conviction relief proceeding and/or other evidence of innocence of the underlying charge. The additional burden of proof, placed on criminal defendants who later assert legal malpractice claims, is based largely upon the public policy concern that those who plead guilty to, or are convicted of, crimes should not be allowed to shift the responsibility for their convictions to their criminal defense attorneys through the institutions of civil malpractice actions.



In cases where direct appeals or other post-conviction proceedings have been instituted by criminal defendants, and have resulted in their exoneration, many courts have found that required predicates to actionable legal malpractice claims exist. Success in these types of proceedings, in the criminal sector, allows legal malpractice plaintiffs to present colorable evidence of their innocence of criminal charges, in later civil malpractice actions, and to argue therein that their prior criminal convictions or sentences were the result of something other than their own culpable conduct.

Courts, however, have not been unanimous in requiring additional evidence in legal malpractice actions arising from the representation of criminal defendants. Most recently, in *Wiley v. County of San Diego*, 58 Cal. App. 4th 434, 68 Cal. Rptr. 2d 193 (4th Dist. 1997), a California appellate court refused to augment the traditional elements of a legal malpractice cause of action by

Calendar

APRIL 1-3, 1998
Spring 1998 National Legal Malpractice Conference
The Four Seasons
Vancouver, BC

SEPTEMBER 23-25, 1998
Fall 1998 National Legal Malpractice Conference
Grove Park Inn
Asheville, NC

APRIL 14-16, 1999
Spring 1999 National Legal Malpractice Conference
Fairmont Hotel
New Orleans, LA

adding the element of innocence as a component of causation in suits arising from criminal representation. In the view of that court, a rule requiring proof of innocence in criminal legal malpractice actions was not supported by compelling evidence of need.

Although the intermediate appellate court in *Wiley* refused to reverse the court below, based upon its failure to require the legal malpractice plaintiff to establish his actual innocence of the criminal charges against him as an element of this malpractice claim against his defense counsel, it is important to note that the criminal conviction of the plaintiff therein had already been overturned, on petition for writ of habeas corpus, based on the falsity of the crucial trial testimony. Thus, although the plaintiff in *Wiley* was not required to prove his innocence, as an element of his legal malpractice claim against his defense counsel, both the trial and appellate courts were well-aware that a predicate to the action had been established as a result of the successful application for post-conviction relief and the overturning of the prior criminal conviction.

The *Wiley* case, however, presently is pending before the Supreme Court of California which has granted review. *Wiley v. County of San Diego*, 97 Cal. Daily Op. Serv. 9662, 97 Daily Journal D.A.R. 15436 (Cal. 1997). Accordingly, the reported decision of the California intermediate appellate court is of little or no precedential value, at this time, and is not a citable authority pursuant to California Court Rules 976 and 977.

Although, at present, the standards of proof for legal malpractice actions arising from criminal representation may not be uniform, in most jurisdictions they will differ from the standards applicable to the proof malpractice actions arising from representation in civil suits. These differences will be evidenced by the imposition of at least one additional element of proof required to state an actionable claim against a criminal defense attorney. Thus, in most states, a double standard of proof in malpractice actions will continue to protect attorneys who represent criminal defendants to a greater extent than civil litigators.

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Bolstering The Indemnity Defense

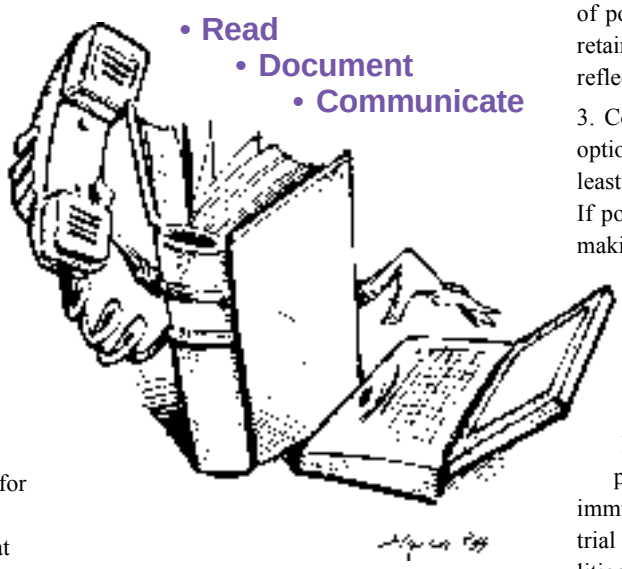
by Kathleen Ewins

The filing of a malpractice action places a defendant attorney's "judgment calls" under the microscope. Though an attorney may find solace in the general principle that she will be immune from liability for her good faith exercise of tactical judgment[1], she may find that the immunity defense is a weak shield. Her unhappy ex-client might well argue that she acted below the standard of care in exercising her judgment.

During the trial-within-the trial, attorney decisions generally assumed "tactical" and, therefore, immune, are often presented to the jury to determine whether they were outside the standard of care. A careful practitioner should take cautionary steps to ensure that judgmental immunity provides a defense against a potential malpractice claim. We do not suggest that these steps represent the standard of care for litigators, but merely best equip them for future "trials-within-the-trial."

One example of a tactical decision that frequently becomes the subject of a trial-within-a-trial determination is an attorney's decision against the use of experts where she concludes that an "expert" would not add to the trier of fact's understanding of the case. A successful litigant will view his attorney as a money-wise hero. An unsuccessful litigant may confront his ex-lawyer with a battery of experts attesting to the value of the case that could have been.

It is up to legal malpractice defense lawyers to convince trial judges to carve out of malpractice cases those tactical decisions that should not be the permitted subject of a



legal malpractice claim. Until there is better guidance in the case law for the application of judgmental immunity, the practitioner should protect herself by considering some of the following steps in representing her clients:

1. Read—Before making decisions—tactical or otherwise—make certain that you have done the research necessary to ensure that your choices are well-founded.

2. Document—Attorneys should document the bases for tactical choices. For example, where experts are considered, but decided against, the file should reflect the identities of potential experts considered, but not retained, and any other information that reflects the attorney's mental processes.

3. Communicate—Communicate tactical options to clients. Seek their approval, or at least their acquiescence, and memorialize it. If possible, include clients in the decision-making process.

Although judgmental immunity may be a defense to a legal malpractice claim, until the rules are better defined and courts begin to apply immunity as a defense early in litigation, it would be prudent for practitioners to act as if judgmental immunity does not exist. A trial-within-a-trial will be easier to narrow in scope if the litigator's file reflects reasoned elections between tactical options that were evaluated with the client.

[1] Smith v. Lewis (1975) 13 Cal.3d 349; Meir v. Kirk, Pinkerton, McClelland, Savary & Carr, P.A. (Fla. App.1990) 561 So.2d 399, 402

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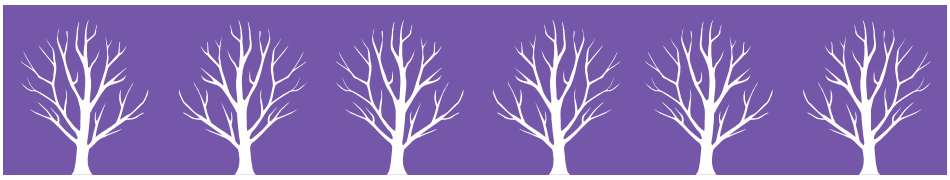
The Canadian Liability Landscape: What's the difference-eh?

by Caron Wishart



The first time I attended an American conference on legal liability, I was struck by how similar the problems and issues that we were (and are) struggling with in Canada are to those in the United States. And yet, there are fundamental, structural differences in the legal liability landscape between our two countries.

What we have in common with practitioners south of the border—and indeed around the world—are the causes of claim losses. In other words, lawyers make very similar mistakes no matter where they practice. In Ontario, for example, the most common errors that give rise to claims are: failure to follow instructions; conflicts of interest; and procrastination. Lawyers' Professional Indemnity Company (LPIC) research indicates that these issues plague lawyers in all jurisdictions, be it one of Canada's other provinces, the U.S.A., England or Australia.

Despite our similarities, there are however fundamental differences between liability markets. In Canada, for example, each of the provinces and territories has its own *compulsory* professional liability insurance program, which is mandated by statute. These programs are administered and underwritten by one of five operating entities:

- In Ontario, the Lawyers' Professional Indemnity Company insures about 17,000 practicing lawyers; LPIC is an insurance company that is owned by the Law Society of Upper Canada but operates completely independently of the Law Society. LPIC also insures lawyers in Newfoundland.
- The Law Society of British Columbia has a captive insurance company that has been fully self-funded since 1997. Prior to that, the program was reinsured by commercial reinsurers.
- The Canadian Lawyers' Insurance Association (CLEA) underwrites a reciprocal policy in six provinces—Nova Scotia, Prince Edward Island, New Brunswick, Manitoba, Saskatchewan and Alberta, as well as the territories.
- Quebec is different again. The Barreau manages its program under an insurance entity, unique to Quebec, distinct from the law society itself. Quebec law is governed by the Civil code, with much of the real estate exposure being addressed by notaries and not by lawyers.

A second difference between liability programs in Canada and the U.S. is the percentage of claims attributed to various areas of law. In Canada, for example, title insurance is a relatively new product. Therefore most of the real estate transactions were and are conducted by lawyers, and any problems arising out of these transactions are brought as errors and omissions claims against lawyers. For that reason, real estate claims in Canada have traditionally caused about forty per cent of losses, significantly higher than in the United States where title insurance is widely used and real estate claims account for only fourteen per cent of losses. As title insurance becomes more widely accepted here in Canada, this statistic may well change.

What conclusion can we draw from this brief analysis: Despite our differences, liability insurers north and south of the 49th parallel share an important concern: the need for risk management. Dialoguing and exchanging information on risk management and loss prevention initiatives is valuable and cuts across all borders.

Caren Wishart is Vice-President for Claims of the Lawyers' Professional Indemnity Company.

Levit Essay Contest Winner Announced

The ABA Standing Committee on Lawyers' Professional Liability and the law firm of Long & Levit LLP have named Robert C. Neff, Jr., an associate at Wilson, Elser, Moskowitz, Edelman & Dicker in Newark, NJ, as the winner of the 1998 Bert W. Levit Essay Contest. The Levit Essay Contest inaugural year competition was won by a paper entitled, "An Attorney's Expanding Obligation to Non-Clients."

The Levit Essay Contest is named for the late Bert W. Levit, distinguished co-founder of the San Francisco law firm of Long & Levit LLP. The contest announcement and topic selection occurs in October and judging is completed in the Spring to allow for the winner's all-expense paid attendance at the ABA Spring LPL Conference, this year being held in Vancouver, British Columbia on April 1-3. The competition winner also receives a $5,000 prize.

The annual competition on a designated topic is open to ABA Young Lawyers and Law Student Division members. Watch this publication for further information on the topic for the 1999 competition or contact Jane Nosbisch at jnosbisch@staff.abanet.org in the Fall 1998.

LPL Advisory is a bi-annual newsletter published by the American Bar Association Standing Committee on Lawyers' Professional Liability for the news and information exchange needs of the lawyers' professional liability community.

Comments and proposed articles should be directed to jnosbisch@staff.abanet.org. Views expressed are those of the authors and do not necessarily represent the policies of the American Bar Association.

Message From the Chair

I have been involved with various lawyer organizations and associations for over 20 years. The Standing Committee for Lawyers' Professional Liability stands out as the most organized, focused organization that I know. As you are aware, the business of legal malpractice insurance is the most dynamic it has been in the last 25 years. Every day new companies enter the market and embark on novel business strategies, while others consolidate, reorganize, and refocus their efforts.

Now, more than ever, the Committee's platform for networking is an important component of our national conferences. The Committee must continue to create an atmosphere that allows you to conduct your business; in this respect, it must provide for the needs of all its constituents.

The Committee stands out because of its commitment to our substantive educational programs. We are not afraid to try something new, to change our format, and partner with related organizations. Our 1998 agenda includes another legal malpractice trial program for trial lawyers and claims professionals.

The Committee consists of only eight members and its staff. Our 1998 goal is to involve more individuals in the work of the Committee. We hope to advance Loss Prevention as a specialty by establishing a working group of professionals who specialize in this area of the business. By the end of 1998 we will institutionalize our data collection function to provide for annual collection and regular reporting of legal malpractice and other information. We will continue this effort in a way that meets the needs of *all our constituents*.

Finally the 1998 goals include beginning the publication of a new legal malpractice textbook, one of the most successful treatises in the field.

Fortunately, the Committee is blessed with the even handed leadership of outstanding staff. Under their guidance, all the different legal malpractice special interest groups have a place in this organization. With the participation of the staff, Committee members, and industry representatives we will continue to grow and mature into *the* gathering place for legal malpractice professionals.

I look forward to seeing you again at our conference and meeting you if you are new to our great organization.

—Joseph P. McMonigle

YOU SHOULD BE AN ASSOCIATE OF THE MALPRACTICE DATA CENTER!

Membership pays for itself through conference registrations alone. . .

The National Legal Malpractice Data Center is an ongoing, investigative project of the Standing Committee on Lawyers' Professional Liability of the American Bar Association. Its purpose is to disseminate information and develop solutions for the malpractice environments for attorneys.

Associate Benefits:

- Free attendance for two persons per office at the Committee's semi-annual Legal Malpractice Conferences.
- A copy of the Lawyers' Professional Liability Update (articles and case law on professional liability , a bibliography of resources, and a state-by-state list of malpractice insurance carriers).
- A copy of each new publication produced by the Committee (except videotapes).

CALL PAM HOLLINS at 312/988-5763 FOR AN ASSOCIATE ENROLLMENT FORM.

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