Legal Malpractice – a good article – California

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California By Clark R. Hudson, Esq. Neil, Dymott, Frank, McFall & Trexler APLC San Diego, California Tel: 619.238.1712 Fax: 619.238.1562 Email: chudson@neildymott.com www.neildymott.com In California, an action for legal malpractice based on negligence requires a showing of the following four factors: (1) the duty of the attorney to exercise the knowledge, skill, and ability ordinarily possessed and exercised by other similarly situated attorneys; (2) breach of that duty; (3) a proximate causal connection between the negligent conduct and the subsequent injury; and (4) actual loss or damage resulting from the negligence.1 While the existence of a duty is a question of law, a breach of that duty is a question of fact.2 In general, the standard of care is considered to be that of members of the profession in the same or similar locality under similar circumstances. Nevertheless, case law has held a "lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field."3 Proof of the applicable standard of care usually requires expert testimony, but when the failure of attorney performance is readily apparent from the facts, expert testimony is not necessary.4 Similarly, a breach of the attorney's duty must be proved by expert evidence, except where the evidence clearly establishes the attorney's "numerous, blatant and egregious violations" of professional standards.5 Proving Causation and Damages As in other jurisdictions, California follows the "trial-withina-trial" doctrine, where "the goal is to decide what the result of the underlying proceeding or matter should have been, an objective standard."6 In other words, a malpractice plaintiff must prove she would have obtained a better result if the defendant had acted as a reasonably careful attorney.7 This means the plaintiff must show careful management of her claim would have resulted in a favorable judgment and collection of it.8 Moreover, without actual loss or damage, there is no tort.9 To prove damages, therefore, the plaintiff must show the probable value of the lawsuit she has lost. It must be noted a showing of collectibility does not apply to every malpractice case. It instead applies only when the alleged malpractice consists of mishandling the client's claim.10 For example, in DiPalma v. Seldman, © September 2015 International Society of Primerus Law Firms, Grand Rapids, Michigan Professional Liability Group the appellate court reversed the trial court's decision to grant the defendant attorney's motion for nonsuit which was based on the uncollectable nature of the underlying judgment. The alleged negligence consisted of advising the plaintiff to quitclaim the property, and the court found had the defendant not advised the plaintiff to convey the property to the debtors, the plaintiff might not have collected any money, but he would not have lost his interest in the property.11 Damages Recoverable In general, a successful malpractice plaintiff in California is entitled to be made whole. As such, she is entitled to receive the value of her claim which was lost. The measure of damages in a legal malpractice case is "the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission."12 Punitive damages, which seek to punish the tortfeasor for his intentional or malicious wrongful behavior, may be recoverable upon a showing of actual damages and the requisite intentional wrongful acts.13 Conversely, a malpractice plaintiff may not recover punitive damages lost in the underlying action as compensatory damages in the subsequent

malpractice action.14 As for damages for emotional distress, it was originally held such damages could be recovered in a legal malpractice action only upon a showing of physical impact or injury and affirmative misconduct or bad faith.15 Although subsequent case law did away with this requirement, a showing of foreseeability is still required. Thus, because emotional distress is typically not a foreseeable result of legal malpractice, such damages are not usually awarded.16 Defenses There are numerous defenses to legal malpractice claims in California. First and foremost, the statute of limitations is an affirmative defense. The applicable statute of limitations for a legal malpractice claim is "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."17 The limitations period will be tolled if any of the following four conditions exist: (1) the plaintiff has not sustained actual injury; (2) the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; (3) the attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney; and (4) the plaintiff is under a legal or physical disability which restricts her ability to commence legal action.18 The third condition regarding willful concealment will only toll the four-year statute of limitations period.19 Negligence of the client can also be asserted as a defense, although California uses a pure form of comparative negligence. Therefore, because liability is proportionally assigned, any contributory negligence on the part of the client will not serve as a complete defense and it will not bar recovery.20 An attorney also cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy or other procedural step. This is because of "the complexity of the law and the circumstances that call for a difficult choice among possible courses of action."21 Accordingly, an attorney cannot be found liable for a reasonable exercise of judgment. Such a defense, however, will not survive a showing of a violation of the client's instructions. A conflicting public obligation may serve as a defense as well. Per the California Supreme Court, To hold the attorney responsible in damages whenever in retrospect it appears he mistakenly sacrificed his client's interests in favor of his public obligations would place an impossible burden on the practice of law. Moreover, awarding damages against the attorney would violate sound public policy, because an attorney frequently faced with the question whether vigorous advocacy in favor of a client must be curtailed in light of public obligation would tilt in favor of the client at the expense of our system of justice.22 California © September 2015 International Society of Primerus Law Firms, Grand Rapids, Michigan Professional Liability Group The court went on to explain the "attorney's choice to honor the public obligation must be shown to have been so manifestly erroneous that no prudent attorney would have done so."23 A final potential defense is that of unclean hands.24 For example, in Blain v. Doctor's Company, the plaintiff physician who had been a former defendant in a medical malpractice action, followed the directions of his insurance defense counsel to lie during a deposition. Subsequently, the physician filed an action against that attorney for legal malpractice. The trial court determined the equitable doctrine of unclean hands worked as a complete bar to any theory of recovery, and the appellate court affirmed. More specifically, the appellate court explained "[a] doctor who lies under oath about the incident for which he is being sued must know that if the lie is discovered it will adversely affect his defense."25 1 Jackson v. Johnson (1992) 5 Cal. App. 4th 1350, 1355 (quoting Budd v. Nixen (1971) 6 Cal. 3d 195, 200); Lucas v. Hamm (1961) 56 Cal. 2d 583, 592. 2 Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 525. 3 Wright v. Williams (1975) 47 Cal. App. 3d 802, 810; 1 WITKIN, CAL. PROCEDURE Attorneys § 288 (5th ed. 2008). 4 Wilkinson v. Rives (1981) 116 Cal. App. 3d 641, 647-48; Wright, 47 Cal. App. 3d at 810. 5 Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1146-47. 6

Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court (2006) 137 Cal. App. 4th 579, 585-86 (quoting 4 MALLEN & SMITH, LEGAL MALPRACTICE § 33.1 (2006 ed.). 7 CACI 601. 8 DiPalma v. Seldman (1994) 27 Cal. App. 4th 1499, 1506-07; Campbell v. Magana (1960) 184 Cal. App. 2d 751, 754. 9 Jackson, 5 Cal. App. 4th at 1355. 10 DiPalma, 27 Cal. App. 4th at 1506-07. 11 Id. at 1508. 12 Norton v. Superior Court (1994) 24 Cal. App. 4th 1750, 1758. 13 Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal. 4th 1037, 1046; Kluge v. O'Gara (1964) 227 Cal. App. 2d 207, 210. 14 Ferguson, 30 Cal. 4th at 1048-49. 15 See Quezada v. Hart (1977) 67 Cal. App. 3d 754, 761-62. 16 See Pleasant v. Celli (1993) 18 Cal. App. 4th 841, 853, overruled by Adams v. Paul (1995) 11 Cal. 4th 583, 591. 17 CAL. CODE CIV. PRO. § 340.6. 18 Id. 19 Id. 20 See Li v. Yellow Cab (1975) 13 Cal. 3d 804, 828-29. 21 WITKIN, supra note 3, § 326. 22 Kirsch v. Duryea (1978) 21 Cal. 3d 303, 309. 23 Id. 24 See Blain v. D