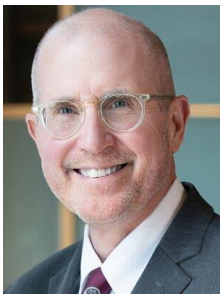
Top 10 Legal Malpractice Defenses As Claims Tick Up

By **Richard Zielinski and Jennifer Mikels** (December 9, 2024)



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Forty years ago, law firms were rarely sued, but today they are a favorite litigation target of both disgruntled clients and third parties, such as investors or bankruptcy trustees, when a transaction or lawsuit has a bad outcome. According to the American Bar Association, 4 out of 5 lawyers will get sued for malpractice at some point in their careers. And those claims can be very costly.

In the most recent Ames & Gough annual survey of lawyers' professional liability claims — which gathered data from 13 insurance companies that collectively insure more than 80% of Am Law 250 firms — 11 of the 13 insurers have participated in a claim payout over $100 million in the past two years. Five insurers paid a claim between $150 million and $300 million, and four paid a claim over $300 million.

That's the bad news.

The good news is that there are many time-tested defenses to legal malpractice claims and, when law firms fully litigate the claims to conclusion, they generally fare quite well. Here are 10 of the more common — and successful — defenses against such claims, based on our experience.

1. Plaintiff Not a Client

An essential element of every malpractice case is the existence of a duty of care running from the defendant law firm to the plaintiff. The most obvious source of that duty is an express or implied attorney-client relationship. Yet, an increasing number of claims these days are brought by individuals who are not, and never were, the firm's clients. This defense often lends itself to a successful dispositive motion. It helps if the firm has a clear engagement letter or other writing identifying who was — and who was not — its client.

2. No Duty to Nonclients

Despite knowing they were not clients, creative plaintiffs will nevertheless allege that the firm owed them a fiduciary or other duty as a nonclient.

There are at least two tried and true defenses to that claim. The first is that, in order for a fiduciary duty to exist, the plaintiff must have reposed trust and confidence in the lawyer's judgment and advice, which they often cannot prove. The second is that courts are reluctant to impose duties running from a law firm to a nonclient, where doing so may create a conflict of interest between that duty and the duty the firm unquestionably owes to its actual client.

The classic situation in which this defense applies is in a suit brought by a beneficiary of an estate against the testator's law firm.

3. Alleged Errors or Omissions Beyond the Scope of Engagement

When clients hire large law firms, they often try to minimize fees by limiting the scope of the firm's legal services. When the matter goes south, however, many of those same clients may sing a very different tune, alleging that the firm was responsible for virtually every aspect of the transaction or litigation.

Typical situations involve the tax implications of a proposed transaction, or the existence of insurance coverage in a litigation context.

Unless specifically agreed, it is typically not the lawyer's job to perform those services. In asserting this defense, it is helpful if the law firm has clear language in its engagement letter describing what services the firm has agreed — and those which it has not agreed — to perform.

4. Law Firm Did Not Violate Applicable Standard of Care

Essential to every malpractice case is proof that the law firm was negligent, i.e., that it violated the standard of care applicable to the matter at hand. In most cases, that requires testimony from a competent expert. Where the plaintiff has a qualified expert, this issue typically plays out as a "battle of the experts" at trial. Where the plaintiff does not, the case can often be resolved on summary judgment.

5. Lawyer's Conduct Was Not Cause-In-Fact of Plaintiff's Injury

Another essential element of a legal malpractice claim is proof that the law firm's error or omission actually caused the plaintiff's injury. Causation in fact is typically framed in terms of a "but for" test, i.e., would the client's injury have occurred but for the lawyer's conduct?

Many jurisdictions interpret the but for standard in malpractice cases as requiring proof that the plaintiff would have achieved a different and better result had it received different and better advice. That can be very difficult to prove, and plaintiffs frequently have little to go on other than rank speculation. In many cases this can be fertile grounds for summary judgment.

6. No Proximate Cause

Related to causation in fact is the defense of no proximate cause. Even if the law firm's conduct is found to have been a but for cause of the plaintiff's injury, there are many circumstances in which the resulting harm was unforeseeable at the time the firm's services were performed.

Alternatively, there may be a superseding cause — such as a bankruptcy or natural disaster — that breaks the causal chain. Raising this defense on summary judgment has worked out some of the time, in our experience.

7. Law Firm Did Not Aid or Abet Client's Misconduct

Nonclient plaintiffs often sue another individual, such as a former business or joint venture partner, claiming fraud or breach of fiduciary duty. Then, sometimes in the same action and often in a separate action, they claim that the other party's law firm aided and abetted the principal actor's wrongdoing. This claim is also often pled, either in addition or in the alternative to aiding and abetting, as a conspiracy claim.

Any such claim, however, requires proof that the firm knew about and substantially assisted its client's misconduct. Those elements can be very difficult to prove.

Many courts have also held that providing routine legal services does not constitute substantial assistance sufficient to support an aiding and abetting or conspiracy claim. In our experience, raising this defense on a motion to dismiss or on summary judgment is usually successful.

8. Comparative Negligence and In Pari Delicto

Most jurisdictions recognize either a statutory or common law defense of comparative negligence, whereby a plaintiff's damages can either be reduced by his or her own misconduct, or the claim defeated in its entirety, if the plaintiff's negligence exceeds that of the defendant law firm.

While this is typically considered a jury question, it is possible to prevail on a motion to dismiss or summary judgment on in pari delicto grounds, a close cousin to comparative negligence, where the plaintiff's actions amount to malfeasance.

9. Plaintiff Suffered No Provable Damages

Proof of actual damages is an essential element of any legal malpractice case. Aggrieved plaintiffs may claim they would have made billions of dollars if only their law firm had perfected their patent application or completed an initial public offering. Like causation in fact, such claims are often based on rank speculation.

At a minimum, plaintiffs should be required to adduce competent expert testimony in order to get to a jury on such inflated damages claims.

10. Statute of Limitations

There is almost always a time lag — often a very long one — between a law firm's provision of legal services and the filing of a legal malpractice claim. In almost every case, it makes sense to analyze whether the plaintiff's claims are barred by the applicable statute of limitations.

Both the limitations period, and the events that trigger the statute, differ from jurisdiction to jurisdiction. In some states, the statute is triggered at the time the alleged malpractice occurs.

Other states employ a version of the so-called discovery rule, under which the claim does not accrue until the plaintiff discovers he or she has suffered measurable harm as a result of their lawyer's conduct.

While statute of limitations defenses often turn on disputed issues of fact and are submitted to the jury, they can sometimes be decided on summary judgment.

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