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Current topics in legal malpractice and malpractice coverage

Staying current on case law in professional liability can help you avoid potential malpractice claims; understanding your malpractice policy can help you deal with them

Professional-malpractice claims affect every type of attorney. The law in this area is complex and dynamic, making it difficult for attorneys to know how to defend themselves. Following is a brief summary of "claims made" vs. "claims made and reported" policies that apply to lawyers' professional-liability policies, followed by a discussion of three current topics that may affect attorneys in their potential role as defendants, in both professional negligence and malicious prosecution cases.

Familiarity with current case law can help attorneys avoid malpractice claims. Furthermore, knowledge surrounding the filing of legal-malpractice claims can ensure that attorneys are covered for any potential liability.

Lawyers' professional liability policies in general

Lawyers' professional liability (LPL) policies in California are written on either a "claims made" or a "claims made and reported" basis. Typically, defense fees and costs erode the policy's indemnity limits [e.g., "burning limits" policies.] In a "claims made" policy, the filing of a claim triggers coverage. A claim is made on the date the insured first became aware of a claim or the possibility of a claim and notified the insurer of such knowledge. The insurance policy in force on the date the insured gained such awareness is the policy that responds to the claim. In a "claims made and reported" policy the claim must be both made *and reported to the policy carrier*, usually in writing, during the policy period.

The claims made-and-reported form provides coverage only for losses which: (a) occurred after the "retroactive date" or "prior acts date" and; (b) were reported during the policy period or extended reporting period (ERP). The "retroactive date" or "prior acts date" is usually the inception date of the first policy the firm secured, as long as the firm has continuously maintained uninterrupted coverage. The policy period or ERP extends backwards in time to the retroactive or prior acts date. A claims-made policy requires the claim be made during the policy period or ERP. Failure to do so can result in the insurer's denial of both coverage and a defense.

The major distinction between the claims-made form and the claims made-and-reported form is that with the pure claims-made form, the insured need only report the claim "as soon as practicable" or "promptly," and not necessarily during the policy term. Some claims-made and claims made-and-reported policies provide an automatic 30-day or 60-day ERP in which a claim or potential claim can be tendered. The insured must take care to comply with the policy's provisions. These provisions usually require that the insured provide prompt and adequate notice of claims or potential claims prior to the policy expiration date. We now turn to some hot topics in the LPL litigation arena.

Evidence of mediation communication

Mediation confidentiality has the effect of barring legal malpractice claims that arise from statements or conduct that occur during, or in relation to, mediation. Mediation confidentiality is established in Evidence Code section 1119 and has been solidified in two recent cases: *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137 and *Cassel v. Superior Court* (2011) 51 Cal.4th 113.)

In *Wimsatt*, the Court of Appeal held that the content of mediation briefs, e-mails and non-contemporaneous conversations relating to mediation could not be disclosed in a subsequent legal malpractice action. After *Wimsatt*, by participating in mediation, clients are in effect relinquishing their rights and all claims for new and independent torts that arise from the mediation, including legal-malpractice actions against their own counsel.

Cassel is the most recent California Supreme Court decision and had the effect of rendering all mediation-related discussions in the underlying case inadmissible in a subsequent malpractice action, even if those discussions occurred away from any other mediation participant. In *Cassel*, the plaintiff filed an underlying action in which the Wasserman firm represented plaintiff. The underlying action proceeded to mediation. The plaintiff complained that during the mediation, Wasserman engaged in fraud and deceit against the plaintiff in order to obtain the plaintiff's signature on the settlement. According to the plaintiff, Wasserman "threatened to abandon him at the imminently pending trial, misrepresented certain significant terms of the proposed settlement, and falsely assured him that they could and would negotiate a side deal that would recoup deficits in the [VDO] settlement itself." (*Id*., 51 Cal.4th at p. 120.) Plaintiff also alleged that Wasserman falsely said it would waive or discount the legal bill if the plaintiff accepted the settlement offer.

These allegations served as the basis for the plaintiff's subsequent lawsuit for damages against Wasserman. The Supreme Court held that under the plain language of mediation confidentiality statutes, mediation-related discussions are inadmissible in a malpractice action, even if those discussions occurred in private, away from other mediation participants. (*Id*. at 128.) The mediation agreement itself can be disclosed under Evidence Code section 1122, but only if it does not reveal anything said or done in the course of mediation.

The effect of *Cassel* is to preclude claims that are based on statements or factual allegations made during media-

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tion. This bars both plaintiffs and defendants from utilizing evidence of what was discussed in mediation in their claim. Similarly, expert testimony necessary for establishing that an attorney acted below a standard of reasonable care cannot be based on what occurred and was discussed at the underlying mediation.

Cassel has been used as a basis for dismissing legal malpractice suits in which the cause of action stems from mediation. Motions in limine can be filed to exclude evidence and arguments based on, or arising from, an underlying mediation. But the Supreme Court in *Cassel* did not seem happy with its decision, but felt compelled to issue it in light of its reading of the statutes. The Court called on the legislature to reconsider the issue, so this malpractice defense may be short-lived.

The attorney-client privilege, like mediation confidentiality, can act as a defense to legal malpractice actions. The privilege is waived per Evidence Code section 958 in typical malpractice actions. However, when a third party brings an action against an attorney, and the action cannot be tried without disclosing a client's confidential communications, then it is improper for the case to proceed. (*Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 463.) In *Solin v. O'Melveny & Myers*, the court dismissed the action against the law firm defendant, determining that the firm could not defend itself without revealing information protected by the attorney-client privilege. Similarly, mediation confidentiality can preclude an attorney defendant from introducing mediation-related evidence or conversations in its defense.

In light of *Cassel* and *Solin*, a tenable argument can be made that, even if the alleged malpractice that occurred had nothing to do directly with the mediation, the malpractice action would require dismissal if the underlying action was settled at mediation. This is so because the attorney would be precluded from introducing evidence as to why the case settled at the mediation and the reasons as to the amount in question (which could have nothing to do with the alleged malpractice). (Cf. *Barnard v. Langer* (2003) 109 Cal.App.4th 1453 [court finds that allegation that better settlement or result at trial too speculative and rules in favor of defendant attorneys].)

By limiting the evidence that attorney defendants can introduce, both mediation confidentiality and attorney-client privilege may preclude claims that invoke the respective evidentiary limitations.

Defenses to malicious-prosecution claims

The leading claim by non-clients against attorneys in California is malicious prosecution. The tort of malicious prosecution is designed to deter those who attempt to take advantage of the judicial system by filing frivolous and meritless lawsuits. Malicious prosecution is a disfavored tort both because of its potential to impose an undue chilling effect on the ordinary citizen's willingness to report criminal conduct or to bring a civil dispute to court and because, as a means of deterring excessive and frivolous lawsuits, it has the disadvantage of constituting a new round of litigation itself.

Malicious prosecution claims, though disfavored, continue to be a potential source of liability for attorneys and their clients. This was most evident in last year's controversial 2-1 decision in *Franklin Mint v. Manatt, Phelps & Phillips* (2010) 184 Cal.App.4th 313. To prevail on a malicious prosecution claim, the plaintiff must demonstrate that the prior action was (1) commenced by or at the direction of the defendant and was prosecuted to a legal termination in the plaintiff's favor; (2) brought without probable cause; and (3) initiated with malice. (*Marijanovic v. Gray, York & Duffy* (2006) 137 Cal.App.4th 1262, 1272.) In *Zamos v. Stroud* (2004) 32 Cal.4th 958, 971, the court held that an attorney may be liable for malicious prosecution for continuing to prosecute a suit after learning it was not supported by probable cause.

Anti-SLAPP statute – Code of Civil Procedure section 425.16

One way to potentially defeat a malicious prosecution case early on is with a special motion to strike pursuant to Code of Civil Procedure section 425.16, California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. SLAPP suits are typically unsuccessful in enforcing a valid legal right on behalf of the plaintiff but succeed in requiring a substantial investment of the defendant's money, time and resources. SLAPP suits often come in the form of civil claims such as defamation, malicious prosecution, and abuse of process (see *Rusheen v. Cohen* (2006) 37 Cal.4th 1048.) The anti-SLAPP statute is intended to encourage citizen participation in matters of public significance.

Under the statute, a cause of action against a person arising from any act in furtherance of a public issue may be subject to a special motion to strike unless the court determines that there is a probability the plaintiff will prevail. The anti-SLAPP statute – which is a procedural screening device – calls for a two-step process. First, the moving party (a defendant or cross-defendant) needs to make a prima facie showing that the lawsuit arises from protected conduct under the anti-SLAPP statute. Once that element is met, the court determines whether or not the plaintiff has a probability of prevailing on the claim. The burden shifts to the plaintiff for this second element. Malicious prosecution lawsuits lend themselves to resolution, via the anti-SLAPP statute, particularly because the favorable termination and lack of probable cause elements are questions of law for the court. The motion generally must be filed within 60 days of the filing of the complaint or amended complaint.

In *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741 the California Supreme Court affirmed that malicious prosecution causes of action fall within ambit of the anti-SLAPP statute. The Court held that if the Legislature had wanted to create an exception to the statute, it would have done so. (*Ibid.*) Accordingly, prong one is automatically met when an anti-SLAPP motion is filed in response to a malicious prosecution action. Conversely, the court in *Kolar v. Donahue, McIntosh & Hammerton, supra*, (2006) 145 Cal.App.4th at 1532, 1539

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found that a garden variety, legal-malpractice action is not subject to the protections of the anti-SLAPP statute.

When a special motion to strike is granted, the prevailing defendant is entitled to attorney fees and costs. (Code of Civ. Proc., § 425.16 (c).) Conversely, only if the court finds that the motion was filed solely for unnecessary delay, or was frivolous, is the plaintiff entitled to attorney fees. There is ambiguity on the type of attorney fees covered under the statute. The Court of Appeal in *Lafayette Morehouse, Inc. v. Chronicle Publishing* (1995) 39 Cal.App.4th 1379, 1383 concluded that "the Legislature intended that a prevailing defendant on a motion to strike be allowed to recover attorney fees and costs only on the motion to strike, not the entire suit." (*Ibid*.) In contrast, the Federal Court allowed for comprehensive attorney fees in *Metabolife International, Inc. v. Wornick* (S.D. Cal. 2002) 213 F.Supp.2d 1220, 1223 awarding a total of $318,687.99 to the defendant. The *Metabolife* court noted that "the California legislature amended the anti-SLAPP statute in 1997, mandating that the statute be 'construed broadly.'"

The shifting of attorney fees creates a potential for a malpractice action when an anti-SLAPP motion is filed and the plaintiff client has an award of attorney's fees entered against her. In *Ellis v. Yang* (2009) 178 Cal.App.4th 869, 881 the plaintiffs voluntarily dismissed the case after an anti-SLAPP motion had been filed, but before the motion was heard. The Court of Appeal held that the trial court retained jurisdiction to decide if the plaintiffs were responsible for attorney's fees and costs predicated on Section 425.16(c). In *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, the Supreme Court held that because the case was dismissed prior to filing the anti-SLAPP motion, the defendant could not recover its fees or costs.

Legal-malpractice cases have been filed after an award of attorney's fees. In these cases, the plaintiffs in the malicious-prosecution case become the plaintiffs in a legal-malpractice case. The plaintiffs assert that their attorneys were negligent in not advising them of the risk of being liable for attorney fees if an anti-SLAPP motion was used to defeat the malicious-prosecution case. As noted above, even if the plaintiff dismisses the case after the anti-SLAPP motion is filed, the plaintiff may still be liable for attorney fees under *Ellis*. Consequently, before filing any malicious-prosecution action, a plaintiffs' counsel should advise their clients of the mandatory nature of attorney fees if a special motion to strike is granted.

Statute of Limitations

Recently it was held that malicious-prosecution claims against attorneys are subject to the one-year limitations period that governs causes of action against attorneys under Code of Civil Procedure section 340.6, rather than the two-year statute that applies to personal injury cases under Code of Civil Procedure section 335.1. (*Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 881.)

Until 2002, malicious-prosecution claims were subject to the one-year limitations period for personal injury under former section 340 (3). In 2002, the Legislature amended section 340(3) and enacted a new section 335.1, which extended the limitations period for personal injuries to two years. In *Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 196, the court applied this two-year limitations period to malicious-prosecution claims against non-attorneys. However, in *Vafi*, the Court addressed the ambiguity as to the applicable statutes of limitations for malicious prosecution claims against attorneys, and ultimately applied the one-year limitations period per the Code of Civil Procedure section 340.6. (*Vafi* (2011) 193 Cal.App.4th at 883.)

Similarly, since separate statutes govern the limitation periods for claims against non-attorneys and attorneys, different tolling periods might apply depending on whether the defendant is an attorney or a non-attorney. Traditionally, the limitation period for malicious prosecution claims against non-attorneys is tolled while the case is on appeal. (*Korody-Colyer v. General Motors Corp* (1989) 208 Cal.App.3d 1148, 1151.) However, under section 340.6, the limitations period is not tolled pending an appeal. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 609.)

Therefore, attorneys can use the one-year statute of limitations to seek to dismiss malicious prosecution cases that fall outside the one-year statute of limitations. In *Vafi*, the defendants successfully filed an anti-SLAPP motion; the Court of Appeal held that the plaintiffs did not have a probability of prevailing on the merits because the action was barred by the statute of limitations. (*Vafi* (2011) 193 Cal.App.4th at 879.)

In addition to attorneys being treated differently than non-attorneys under Code of Civil Procedure section 340.6 with regard to the one-year limitation period, arguably a one-year statute of limitations could also apply to malicious-prosecution plaintiffs that are corporations, as opposed to individuals. The rationale is that corporations cannot obtain personal-injury damages and therefore should be subject to the same limitations period as attorneys. Moreover, malicious prosecution is a disfavored tort. A shorter statute of limitations for corporations further limits the availability of this disfavored remedy.

In sum, the next time you entertain the idea of filing a malicious prosecution action, be aware of the potential attorney fees, as well as the statute of limitations. As always, communicate with your client up front about the potential risks and rewards of such an action.

Conclusion

In the long run, there is no foolproof way to avoid a malpractice claim, but timely and effective communication with your client certainly can go a long way to avoiding such claims. In the event a claim is made against you, having an appreciation for the type of policy you have and its terms will help you navigate what can be a challenging aspect to any attorneys' career.

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