SANDBERG PHOENIX

PROFESSIONAL LIABILITY BLOG

Attorneys' Fees in Professional Malpractice Actions: A Developing Theory?

AUTHOR: SANDBERG PHOENIX

(NOTE: The analysis and views expressed by the author are his and are not necessarily those of Sandberg Phoenix or others at the firm.)

Introduction

In the legal malpractice context, Missouri has long recognized that one measure of damages "is the amount the plaintiff would have received *but for* the attorney's conduct." Estate of Bonifer v. Kullmann, Klein, & Dionenda, P.C., — S.W.3d —, 2014 WL 6464011, *3 (Mo. App. E.D. Nov. 18, 2014). This measurement—couched in somewhat vague phraseology to promote flexible application—signifies in simple terms that a court will require, at minimum, proof of a causal relationship between a defendant's malpractice and a plaintiff's injury. The goal of such a test is to eradicate unsubstantiated speculation and guesswork as to the true cause of plaintiff's injury. Id. (finding that plaintiff's argument that it could have negotiated and secured a settlement for more than $35,000—an amount negotiated by plaintiff's attorney—rested on speculation and was insufficient as a matter of law when the record failed to reflect that the underlying defendant was willing to offer anything more and when the negotiated settlement was eventually set aside at trial).

In applying this measure of damages, many courts have agreed that the additional costs incurred by a client who is forced to hire a second attorney to correct the mistakes of the first attorney in the underlying litigation satisfy the "but for" causal test. See, e.g., Sanders v. Flanders, 564 F.App'x 742, 746 (5th Cir. 2014) (noting a legal malpractice plaintiff may recover damages for attorneys' fees he paid in an underlying matter if the fees were proximately caused by the negligent conduct of the defendant attorney); see also 34 Mo. Prac., PERSONAL INJURY AND TORTS HANDBOOK § 12:12 (2014 ed.) (accord). Indeed, one could scarcely argue that the legal fees of the second attorney were incurred for speculative or otherwise unknown reasons. The cause of these fees is, of course, the first attorney's malpractice: *but for* the first attorney's malpractice, the plaintiff would not have been required to hire a second attorney and would not have had to incur a second set of fees.

Recovering fees in the underlying litigation arguably gets the plaintiff only halfway to a *full recovery*. One might ask: what about the legal fees plaintiff is forced to incur in litigating his or her malpractice claim—are these fees recoverable? Indeed, they would not have been incurred *but for* the defendant-attorney's malpractice. In fact, without a recovery of these fees, couldn't it be argued that the plaintiff receives a diluted award—something less than a *full recovery* for the defendant-attorney's malpractice? This article sets out to consider these fees, how they are treated in Missouri, and how they have recently been treated by jurisdictions outside of Missouri.

Fees Incurred in Litigating a Malpractice Action—Are they Recoverable?

Consider the hypothetical plaintiff who suffers $100,000 in damages as a result of malpractice. On top of these damages, this plaintiff needs to hire a second attorney to correct the malpractice in the underlying litigation (assume this amount is $20,000). In addition, this same plaintiff would need to hire a third attorney to litigate his or her claim against the attorney who committed malpractice (assume an additional $20,000 in fees). Thus, rather than receiving $100,000 in damages, the plaintiff will receive, at most, $60,000—subtracting the fees of the second and third attorneys. At first glance, this result appears rather inequitable and fails to achieve the goals of the malpractice cause of action.

Modern law—as mentioned above—appears to have already addressed the second attorney's fees: plaintiff is generally permitted to recover those fees paid in the underlying litigation that are proximately caused by the negligent conduct of the defendant attorney. See Sanders, 564 F.App'x at 746. The fees of the third attorney, however, are another matter. Opponents will argue that the fees of the third attorney cannot be recovered due to the American Rule, a relic of early American common law holding (generally) that the victor in litigation is not entitled to his or her attorneys' fees except when expressly permitted by contract or statute. See, e.g., Dinkins v. South Iron R-1 School Dist., 445 S.W.3d 600, 608 (Mo. App. S.D. 2014). Indeed, the Supreme Court of Washington was recently faced with this very question and found in favor of the American Rule's application. See Schmidt v. Coogan, 335 P.3d 424, 434 (Wash. 2014) (finding the American Rule should apply in legal malpractice cases and arguing "it would be anomalous to award attorney fees in this context but not in other tort contexts").

So, what is the plaintiff to do? That depends on the jurisdiction. Some courts find blind adherence to the American Rule rather short-sighted; these courts are inclined to emphasize the American Rule's *purpose* rather than its *effect*—a purpose predicated on the free utilization of the American court system and vigorously applied so as to "avoid penalizing a party for merely defending or prosecuting a lawsuit." Rohm & Haas Co. v. Crystal Chem. Co., 736 F.2d 688, 690 (Fed. Cir. 1984). Arguably, it is the plaintiff who is penalized under the American Rule in the professional malpractice context; plaintiff is guaranteed to return, at best, to something less than his or her original position pre-malpractice, because he or she must pay considerable fees to litigate and establish the defendant-attorney's liability. Indeed, perhaps recognizing this reality, the Superior Court of New Jersey has long held that fees incurred in establishing an attorney's malpractice liability are consequential in nature and are, consequently, awardable damages in the malpractice action itself, despite being "directly contrary to the American Rule's prohibition." See In Re Estate of Lash, 776 A.2d 765, 773 (N.J. 2001) (finding an award of attorneys' fees was authorized "due to the significance of the attorney-client relationship").

Other courts are more creative. In Washington, for example, it was found that the plaintiff should receive the full amount of his damages without deducting the contingency fee owed to the defendant-attorney in the underlying action. See Shoemake ex rel. Guardian v. Ferrer, 225 P.3d 990, 993 (Wash. 2010). The Washington Supreme Court, which declined to enforce a "mechanistic application of the American Rule," recognized the reality that a second attorney would need to be hired to complete the job and ultimately reasoned that—pursuant to the Third Restatement of Law Governing Lawyers—the defendant-attorney should not be credited with a fee that he or she never earned. Id. (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 53 cmt c. (2000)).

In Iowa, this same approach was recently adopted in the context of hourly fees. In particular, plaintiff was entitled to offer evidence as to the amount it paid the defendant-attorney in the underlying action as recoverable damages in the malpractice action. See Quad City Bank & Trust v. Elderkin & Pirnie, P.L.C., 2015 WL 799551, *9 (Iowa App. Feb. 25, 2015). Notably, the approach used by both Washington and Iowa does not violate the American Rule. The fees being awarded are not those incurred in litigating the malpractice claim; instead, under an unjust enrichment theory of recovery, plaintiff is being refunded fees the defendant-attorney never earned in the underlying action.

Missouri's Approach (or Lack Thereof)

Missouri courts have yet to decide the issue, though they have regularly permitted recovery of fees caused by "collateral litigation" resulting from an attorney's malpractice. See, e.g., Meyer v. Purcell, 405 S.W.3d 572 (Mo. App. E.D. 2013) (attorneys' fees paid to recover assets of estate were proper damages in malpractice action); Johnson v. Mercantile Trust Co. Nat'l Ass'n, 510 S.W.2d 33, 40 (Mo. 1974) (considering damages in a collateral litigation context and finding that "where the natural and proximate result of a wrong or breach of duty is to involve the wronged party in collateral litigation, reasonable attorneys' fees necessarily and in good faith incurred in protecting himself from the injurious consequence thereof are proper items of damages"); Collier v. Manring, 309 S.W.3d 848, 853 (Mo. App. W.D. 2010) (same).

The collateral litigation rule requires plaintiff to prove attorneys' fees were incurred in a different cause of action, involving a different party, caused by the defendant-attorney's malpractice—making it inapplicable to the issue raised here. Nonetheless, the rationale for the rule shares many parallels with the rules in Washington and Iowa: plaintiff should not be forced to pay attorneys' fees associated with litigation created (or prolonged) by defendant-attorney's malpractice. In this sense, it is easy to find the additional fees and time associated with hiring a second attorney to correct the mistakes of the defendant-attorney are collateral in nature. Of course, if a second attorney is needed to correct the mistakes of the defendant-attorney in the underlying action, then it must also be true that the defendant-attorney failed to perform his or her duties as promised. The fact that the defendant-attorney is permitted to earn a fee for a breached promise—either hourly or contingent—is an issue ripe for discussion in Missouri and could develop into a rule mirroring the ones used in Washington, Iowa, or even New Jersey.

How Much Is Enough: Determining the Scope of Fees to Be "Refunded" to the Plaintiff

Assuming Missouri were to recognize that attorneys' fees should be awarded in malpractice actions (as in New Jersey) or that the defendant-attorney should refund certain fees collected from plaintiff in the underlying action (as in Washington and Iowa), it still must be determined how much plaintiff should be awarded or refunded.

The Iowa Court of Appeals presents one framework for determining the precise amount of refundable fees owed by the defendant-attorney: "the amount of attorneys' fees the [plaintiff] is entitled to recover from the law firm [is an amount attributable to] the work the law firm did … that proximately caused the [plaintiff] injury." Quad City Bank & Trust, 2015 WL 799551, *10 (Iowa App. Feb. 25, 2015) (emphasis added). Thus, it was held that "the attorney fees the [plaintiff] can recover from the law firm include only those fees charged by the law firm that did not benefit the bank." Id. This particular standard can be both substantially narrow and exceptionally broad: compare, for example, the case of an attorney binding his or her client to an unfavorable position early in the litigation process with the case of a negotiated settlement at the tail end of litigation.

Recapping the Various Theories

Returning to the hypothetical plaintiff who sustained $100,000 in damages, it appears he is entitled to a return of the first $20,000 in fees incurred by hiring a second attorney to correct the malpractice in the underlying litigation. So far, plaintiff's damages have not been diluted. Thereafter, we assumed, plaintiff will incur an additional $20,000 in litigating the malpractice action itself. Unless one adopts New Jersey's approach (attorneys' fees attributable to litigating a malpractice claim are awardable), we must assume these fees are not recoverable. Plaintiff's maximum award is, therefore, diluted to $80,000. But, let's also assume Missouri adopts the approach of Washington, Iowa, and the Third Restatement of Law Governing Lawyers: that the defendant-attorney is not entitled to the fees he or she received in the underlying litigation that caused malpractice to occur (which must be returned under an unjust enrichment theory). For simple math, let's further assume the amount collected by the defendant-attorney in the underlying action was also $20,000. By refunding this

amount to the plaintiff in the malpractice action, we now return to the $100,000 originally owed to plaintiff—making plaintiff whole, as is the aim of the malpractice remedy. Moreover, the American Rule is preserved because plaintiff will be left to pay out-of-pocket for the services of his attorney in litigating the malpractice action. Thus, although not always perfectly equal to each other (and in some cases not equal at all), the fees refunded by the defendant-attorney in the underlying action under an unjust enrichment theory offset the fees plaintiff must pay in litigating the malpractice action against the defendant-attorney.

As Ronald E. Mallen suggests, "in trading the client's legal fees in the malpractice action for the defendant's fees in the underlying action, a party, essentially, is allowed to recover attorneys' fees in a negligence action." See 3 LEGAL MALPRACTICE § 21:28 (2015 ed.). This observation, though not yet addressed by Missouri courts, is one that both plaintiffs and defendants should make themselves aware of as the law in other jurisdictions continues to develop toward this offset theory of recovery.

The Takeaway

Professional malpractice defendants must prepare themselves for emerging case law that suggests they will be required to pay for the attorneys' fees incurred by plaintiffs in litigating malpractice actions. These fees may be directly awardable in the malpractice action itself (as in New Jersey), or the defendant may be required to "refund" collected fees in the underlying action (as in Washington and Iowa). See 3 LEGAL MALPRACTICE § 21:28 (2015 ed.). Meanwhile, plaintiffs should consider the possibility that they may be able to recover certain fees as part of their malpractice claim, positioning themselves to avoid a diluted award when confronted with multiple sets of attorneys' fees in the underlying action and the malpractice action.

The potential applications of the emerging case law are many, and can be either beneficial or harmful depending on what side you're on. Regardless, counsel handling professional liability actions should be aware of these trends, as should all attorneys when engaging in their professional work.

By Shane K. Blank

Shane Blank

Image not found or type unknown