

Legal Malpractice Considerations for Workers' Compensation Lawyers

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What Is Legal Malpractice?

- To prevail in a legal malpractice cause of action, the plaintiff must plead and prove: (1) that an attorney-client relationship existed; (2) that a duty arose from that relationship; (3) that the defendant breached that duty; and (4) that plaintiff suffered actual damages as a proximate result of the breach. *Lucey v. Law Offices of Pretzel Stouffer, Chartered*, 301 Ill.App.3d 349, 353 (1st Dist. 1998).

What Types of Activities Fall Within the Legal Malpractice Umbrella?

- Provision of legal services
 - Representation?
 - Advice?
 - Referrals?
- *Brush v. Gilsdorf*, 335 Ill.App.3d 356 (3d Dist. 2002)
 - “The court must look to the ‘nature of the behavior alleged’ in plaintiff’s complaint to ‘determine whether the activities fall within the term “legal malpractice.”
 - **“Here, because the injury was suffered by reason of the attorneys’ professional conduct during the course of legal representation, the gravamen of the claim is legal malpractice, regardless of which theory or claim has been pled.”** *Id.* at 361. (emphasis added).

Statutes of limitation and repose

- The Limitations Act for Attorneys states:
- “(a) In this Section: “attorney” includes (i) an individual attorney, together with his or her employees who are attorneys, (ii) a professional partnership of attorneys, together with its employees, partners, and members who are attorneys, and (iii) a professional service corporation of attorneys, together with its employees, officers, and shareholders who are attorneys; and “non-attorney employee” means a person who is not an attorney but is employed by an attorney.
- (b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced **within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.**

Statutes of limitation and repose cont'd

- (c) Except as provided in Subsection (d), an action described in Subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.
- (d) When the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered, the action may be commenced within 2 years after the date of the person's death unless letters of office are issued or the person's will is admitted to probate within that 2 year period, in which case the action must be commenced within the time for filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later, as provided in the Probate Act of 1975.
- (e) If the person entitled to bring the action is under the age of majority or under other legal disability at the time the cause of action accrues, the period of limitations shall not begin to run until majority is attained or the disability is removed.
- (f) This Section applies to all causes of action accruing on or after its effective date.”
735 ILCS 5/13-214.3.

Punitive damages

- “In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed.” 735 ILCS 5/2–1115.
- *Cripe v. Leiter*, 291 Ill.App.3d 155 (3d Dist. 1997)
- *Weidner v. Karlin*, 402 Ill.App.3d 1084 (3d Dist. 2010)

Establishing Duty, Breach, and the Standard of Care

- Generally, expert testimony required
- Exception: “Grossly apparent”
- *Barth v. Reagan*, 139 Ill.2d 399 (1990)

Proximate Cause in Legal Malpractice Claims

- “But for”
- Litigation Cases
 - “Case within a case”
 - *Governmental Interinsurance Exchange v. Judge*, 221 Ill.2d 195 (2006)
- Transactional Cases
 - “Client’s exposure to risk that the client did not knowingly and voluntarily assume”
 - *Union Planters Bank, N.A. v. Thompson Coburn, LLP*, 402 Ill.App.3d 317 (5th Dist. 2010)

“Actual Damages”

- Actually incurred
- Cannot be speculative
- Specific to Plaintiff
- May include attorney’s fees

Illinois Rules of Professional Conduct and Legal Malpractice

- Not a separate cause of action, but...

IPI 105.01 – Modified

- “A lawyer must possess and use the knowledge, skill, and care ordinarily used by a reasonably careful lawyer. The failure to do something that a reasonably careful lawyer would do, under circumstances similar to those shown by the evidence, is ‘professional negligence.’”
- “The phrase ‘deviation from the standard of care’ means the same thing as ‘professional negligence.’”
- “The law does not say how a reasonably careful lawyer would act under these circumstances. That is for you to decide. In reaching your decision, you must rely upon opinion testimony from qualified **witnesses [and evidence of the Rules of Professional Conduct]**. You must not attempt to determine how a reasonably careful lawyer would act from any personal knowledge you may have.”

Balancing Competing Obligations

Scenario 1

- Attorney Leonard and Attorney Penny practice in the same area of law and frequently appear on opposite sides. They are also social acquaintances.
- Attorney Leonard begins representing Sheldon in prosecuting a workers' compensation claim against Amy's company, and Attorney Penny begins defending Amy's company



Scenario 1 Cont'd



- Sheldon instructs Attorney Leonard to “play hardball” and refuse to extend Attorney Penny (or her client) any courtesies or extensions, even on routine discovery issues
- Sheldon (having watched many episodes of Law and Order, Boston Legal, and the Good Wife) further requests Attorney Leonard to file numerous Motions against Amy’s company as well as numerous discovery requests that are intended to be burdensome and not related to the litigation

Scenario 1 Cont'd

- Sheldon also asks Attorney Leonard to exaggerate and/or “fib” during court appearances regarding their compliance with discovery and various Motions they have filed
- Sheldon would also like to provide an affidavit in support of a Motion, although he admits that not all of the information is “100% accurate”

Scenario 1 Cont'd

- Sheldon would like Attorney Leonard to convince Sheldon's friend, Howard, to refuse to talk to Amy or Amy's lawyer, since Howard has evidence that might hurt Sheldon's claim



Obligations At Issue

- Obligations to client
- Obligations to opposing counsel
- Obligations to the Court

Obligations to Client

- Zealous Representation
- ILRPC 1.1: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Obligations to Opposing Counsel

- Honesty
- Fairness
- Civility
- Adherence to Rules

ILRPC 3.4 (Excerpts)

- A lawyer shall not:
- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- **(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;**
- **(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;**
- **(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;**

ILRPC 3.4 (Excerpts)

- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

ILRPC 4.4: Respect for Rights of Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows that the document was inadvertently sent shall promptly notify the sender.

Obligations to the Court

- Candor
- Meritorious Claims and Contentions
- Truthfulness
- Compliance with Rules

ILRPC 3.1: Meritorious Claims and Contentions

- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

ILRPC Rule 3.3: Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
 - **(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;**
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

ILRPC 3.3 – Cont'd

- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ILRPC 4.1: Truthfulness in Statements to Others

- In the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person; or
 - (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ILRPC 8.4 (Excerpts): Misconduct

- It is professional misconduct for a lawyer to:
- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (d) engage in conduct that is prejudicial to the administration of justice.
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

ILRPC 8.4 (Excerpts) Cont'd

- (g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.
- (h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

Other workers' compensation scenarios

Common pitfalls

- Inattention to finances
 - Client Trust Accounts
 - Rule 1.15
 - Client Trust Account Handbook
- Failure to Communicate
 - Managing expectations
 - Rule 1.4
- Scope of Representation and the Retainer Agreement
 - Rule 1.2
 - Rule 1.16
- Fees
 - Rule 1.5
- Neglect of Case
 - Rule 1.3

Best practices

- Refer to Rules
- Call ARDC Ethics Inquiry Program: 312-565-2600
- Pull case law
- Use common sense

Questions and Comments