Current Trends in Handling Legal Malpractice Claims

…and what happens if the judge erred.

I. Current Trends

"Non-legal malpractice" claims have supplanted malpractice

Examples of non-legal malpractice claims

- Breach of Fiduciary Duty
- Negligent Misrepresentation
- Statutory Claims
- Abuse of Process
- Malicious Prosecution
- Tortious Interference
- Aiding and Abetting
- Civil Conspiracy
- Damage claims exceeding policy limits

Analyzing Coverage of "Non-Legal Malpractice" Claims Under an LPL Policy

Duty to defend • Defenses to coverage • Panel Counsel vs. Mutual Counsel • Declaratory actions

"Non-Legal Malpractice" Claims where a defense was provided under an LPL Policy

- Aiding and abetting claims against an attorney in alleged *Ponzi* scheme.
- FDCPA claims in a class action against attorney.
- Breach of fiduciary duty and tortious interference with inheritance claims against attorney who acted as trustee for a trust.

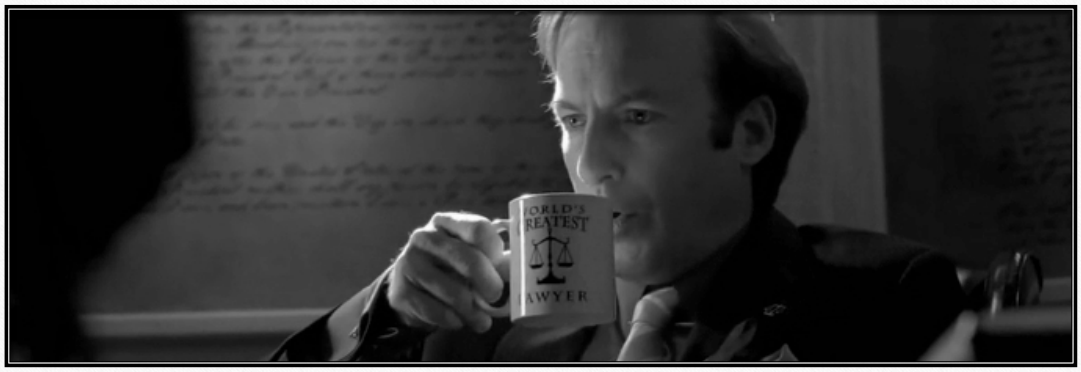
II. Errors by the Court

Determining whether the judge or the attorney was at-fault • Mitigation through appeal or settlement

Hypothetical No. 1

Insured firm notifies the carrier that one of their litigators just received an adverse decision from the State's highest court which they say reverses 50 years of law. The firm advises that it has been notified by its client that the client is going to hold the law firm accountable for failing to advise the client to settle when it had a chance to do so before the adverse decision was announced.

- Is there a coverage problem?
- What approach would you consider for the defense? Would you consider retaining an appellate law specialist to evaluate the standard of care and causation issues?
- Would the approach be different if the allegations included a claim that the law firm down played adverse authority from another part of the forum state or adverse federal authority?
- What if the facts showed that the handling lawyer had no other legal work he was performing at the time the advice to continue the appeal was given?



Are lawyers allowed to be average? Can a lawyer be sued for failing to anticipate a future decision?

Generally lawyers are required to act over and beyond average skill, learning and ability would unreasonably burden the legal system. *Simko v. Blake*, 532 N.W.2d 842, 847 (Mich. 1995). Attorneys cannot possibly be required to predict infallibly how a court will rule. *Id.*

Hypothetical No. 2

Insured is defending a lawsuit in which an affirmative defense is the focus of the defense. During the charge conference the court after allowing testimony on the affirmative defense withdraws the instruction on the defense from the jury charge because no expert testified in support of the elements of the affirmative defense. Jury sends out questions during the deliberations that show the jury believes that the facts that were adduced in support of the defense should defeat the plaintiff's claim. Judge refuses to change the jury charge. Jury finds for the plaintiff. Defendant cannot afford the appeal, but finds a plaintiffs lawyer to assert a claim against the insured lawyer for failing to put on sufficient evidence to support the defense.

- Suppose the law in the circuit is split on whether expert testimony is necessary to support the affirmative defense. What approach would you take to defending the case?
- Would you consider buying the judgment and releasing it in order to remove the plaintiff's damage claim in the malpractice case?

Should counsel have anticipated the judicial error?

Thibodeaux vs. Brand & Gallagher, LLC, 109 So.3d 501 (La. Ct. App. 2013). In the abstract, "it is always foreseeable" that a trial court will make a mistake – why else do we have appellate courts? *Lombardo vs. Huysentruyt*, 101 Cal. Rptr.2d 691, 700 (Cal. Ct. App. 2001). Lawyers bore some responsibility for the entry of default judgment in a case, despite the trial court's negligence in entering it, in *Skinner vs. Stone, Raskin & Israel*, 724 F.2d 264 (2nd Cir. 1983).

Hypothetical No. 3

Insured firm notifies carrier that a probate court has misapplied a legal principal that has led to its client receiving nothing from the probate estate.

- Does the policy require the carrier to appoint counsel to try to remediate the claim?
- Would you consider retaining separate counsel to handle the appeal to try to unwind the trial court's decision?
- Are there potential dangers created by remediation of the trial court's error?

Hypothetical No. 4

Arbitrator issues a decision that is contrary to the law of the circuit. Former client sues the lawyer for failing to adequately vet the potential arbitrators who would hear the arbitration. After the arbitration defense insured learns that the arbitrator failed to disclose business dealings the arbitrator had with opposing counsel in other matters?

- Has the lawyer fallen below the standard of care?
- Can causation be established in the underlying matter if the law of the forum state is that arbitrators do not have to follow the law of the circuit?

Our Heroes:

Huang vs. Brenson, 7 N.E.3d 729 (Ill. App. Ct. 2014) • *Hanson v. Fowler, White, Burnett, PA*, 117 So.3d 1127 (Fla. 3d DCA 2012)

Our Heroes

Huang vs. Brenson

The Court of Appeals affirmed dismissal of a legal malpractice claim because the trial court in underlying action should have granted Huang either summary judgment or a directed verdict. In another legal malpractice case arising from an action before the Illinois Court of Claims, *Green v. Papa*, 4 N.E.3d 607 (Ill. App. Ct. 2014) (judgment for the attorney defendants was affirmed since the Court of Claims decision resulted from the court's own erroneous conclusions of fact and law, not counsel's malpractice).

Hanson v. Fowler, White, Burnett, PA

No causation because of lack of foreseeability. The underlying case was federal lawsuit involving maritime liens, foreclosure and fraud. (Court of Appeals noted "that no one could have anticipated what the District Court ultimately did," and it was the District Court's actions that caused the plaintiff's loss. *Id.* at 1134.)

Who gets to decide?

Henok vs. Schwartz, 53 F.Supp.3d 139 (D.C. 2014), question may remain for the trier of fact. 162 P.3d at 1256. If you're in a small jurisdiction, the same judge who made the "wrong" decision may be the same jurist who will decide it the decision was, in fact, incorrect. Dues that bring the judge's impartiality into question? While in a different context, the cases of Poormen vs. Commonwealth, 782 S.W.2d 603 (Ky. 1980) and Kendler vs. Rutledge, 396 N.E.2d 1309 (Ill. App. Ct. 1979) may be helpful.

Questions?