What is legal malpractice?

LEE EN ESPAÑOL (https://saclaw.org/resource_library/negligenica-legal/)

Attorneys have a duty to their clients use such skill, prudence, and diligence as members of the legal profession commonly possess and exercise (the “standard of care”). Malpractice occurs when the attorney breaches that duty; and the breach causes injury; and the injury causes actual loss or damage.

Common forms of malpractice: Missing deadlines; inadequate research; failing to assert a valid defense; failing to file a compulsory cross-complaint; ignoring the client’s instructions; and failure to convey or get consent to a settlement.

How do I prove legal malpractice?

To prove legal malpractice, a plaintiff must show:

- There was an attorney-client relationship (with rare exceptions);
- The attorney was negligent (breached the duty of care);
- The negligence caused plaintiff’s injury; and
- The injury caused actual damages.

In most cases you are **required to hire an expert witness** to establish the duty of care and causation. If the malpractice occurred in litigation, you will need to put on a “trial within a trial” to prove that you would have obtained a better result in the underlying case if not for the attorney’s malpractice – essentially redoing the entire case.

Warning: very short time to file

Legal malpractice has a short statute of limitations: the earlier of 1 year after the plaintiff discovers (or should have discovered) the injury, or 4 years after the date of injury. California Code of Civil Procedure (CCP) § 340.6 (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=340.6.&lawCode=CCP) .

Other causes of action, such as breach of contract (CCP § 337 (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=337.&lawCode=CCP)), breach of fiduciary duty (up to 4 years after the plaintiff discovers (or should have discovered) the breach, CCP § 343 (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=343.&lawCode=CCP)), intentional or negligent infliction of emotional distress (2 years from actual harm, or discovery if facts concealed by defendant, CCP § 335.1 (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=335.1.&lawCode=CCP)), and fraud (3 years after actual discovery, CCP § 338(d) (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=338.&lawCode=CCP)), sometimes apply to attorney-client situations. Depending on the facts of the case, some of these may be more favorable to the plaintiff.

No malpractice liability to non-clients

Lawyers owe a duty of care only to their clients. An exception arises when the lawyer is hired to protect the interests of a third party, such as the beneficiary of a will or trust. Otherwise, attorneys are not liable to non-clients for malpractice (although they may be liable on other theories, such as misrepresentation, civil conspiracy with the client, or malicious prosecution).

Trial within a trial

Even if the lawyer is found to be negligent, you cannot win your malpractice case unless you also prove that, more likely than not, you would have gotten a better result in the original matter if the lawyer had met the standard of care. If the original matter was litigation, you will essentially have to re-try the entire case.

In addition, if you were the plaintiff in the underling case, you must prove that the defendant would have been able to pay the resulting judgment.

Proving these matters can be expensive and time-consuming. If the case is at all complex, the jury may find it confusing to have to essentially decide two cases at once. If the underlying case is based on events of many years past, it may be difficult to gather evidence or produce witnesses.

In some cases, the judge may permit you to use expert testimony to prove that you would probably have won the underlying case. The expert can review the underlying case and give an opinion as to its validity. The judge in your malpractice case will make the decision whether or not expert testimony is an acceptable alternative.

The role of the expert witness

In almost all cases, expert testimony is required to prove that the lawyer violated the standard of care. An expert is always required if the issue is in a specialized area of practice. In these cases, if the plaintiff does not present expert testimony, the judge will usually dismiss the case or grant summary judgment for the defendant. There are a few cases where the mistake is so clear that no expert testimony is required—missing a deadline might be an example – but they are very rare.

Expert witnesses are required to:

- Define the standard of care applying to the particular situation, and
- Offer a professional opinion whether the defendant met that standard of care.

Experts may also be needed to establish likelihood of success in the underlying action (the "trial within a trial" requirement).

Finding an expert witness

Expert witnesses can be found through directories, referral services, or professional associations, and by researching cases and articles on relevant topics to find names of people who have worked in the subject.

Getting help with your legal malpractice case

Legal malpractice lawsuits are extremely complicated and have unique requirements. Self-represented people are expected to research and comply with these requirements and can lose their case if they do not. We highly recommend consulting with an attorney. Some ways to find an attorney:

Personal Referrals: Talk to your family or friends for referrals to trusted lawyers.

Online Directories: You can often search these by geographic location and specialty, so you can limit your search to "Sacramento" and "medical malpractice" or "wrongful death." Two well-known ones are the Martindale-Hubbell Directory (https://www.martindale.com/find-attorneys/) and Nolo's Lawyer Directory (https://www.nolo.com/attorney-consult) .

Attorney Referral Services: These services are vetted by the State Bar of California. They may be based on geography or topic. You can call 866-44-CA-LAW or visit the website of the State Bar

of California (https://www.calbar.ca.gov) for lists of services.

Advertisements: Yellow Pages, newspaper ads, or the Internet may be a good starting point as well.

Print Resources: The Sacramento County Public Law Library has a range of print directories and friendly reference law librarians available to assist you.