

# **A Victim's Guide To Hiring Legal Malpractice Counsel**

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## **Introduction**

In 1994, I handled my first legal malpractice case. It went to trial. I won. Since then, I have recovered tens of millions of dollars for clients in legal malpractice cases; I have saved clients millions of dollars in attorney fee disputes; I won the Orange County Trial Lawyer of the Year award in the legal malpractice category; I served as a volunteer California State Bar Special Deputy Prosecutor; I became a California State Bar certified specialist in legal malpractice law; and I regularly get hired as an expert witness in legal malpractice cases. I spend a significant percentage of my professional time representing legal malpractice victims.

My law firm receives about 20 new client calls every day to evaluate potential legal malpractice cases. This guide is designed to help victims interview counsel to handle legal malpractice and billing dispute cases.

## **Do you need malpractice counsel now?**

When a lawyer makes a mistake in pending litigation, clients frequently feel the need to hire legal malpractice counsel immediately. While the feeling is justified, hiring legal malpractice counsel is typically premature until the attorney-client relationship ends, or the case ends badly.

If the attorney-client relationship is continuing, then the one-year statute of limitation does not start accruing, and the malpracticing attorney might be able to correct the error or reduce the client's damages that the error caused. Setting aside the one-year statute of limitations discussed below, it is typically difficult to determine a client's damages arising from legal malpractice until the pending case is finished. The attorney's error might not even impact the outcome of the case.

If you call us to discuss a case where the malpracticing attorney still represents you, then most of the time we will advise you to call us back when the attorney-client relationship ends or when the case ends badly.

## **Get Organized**

Most lawyers begin new client consultations by getting basic questions answered. If you call us, then expect we will ask the following questions.

What are the names of the potential clients? What are the names of the potential defendants? We need this information to determine if there is a conflict of interest. If we have a conflict of interest, then the consultation likely ends.

How much money is at issue? The answer typically includes the total amount paid to the attorney and the money lost because of the attorney's error. We initially focus on measurable economic damages, not noneconomic damages (*i.e.*, pain and suffering damages). Most of the time, noneconomic damages are not recoverable in legal malpractice cases.

While potential clients may not be able to determine their economic damages with precision, we need a ballpark answer. The amount of money in controversy informs us whether the potential legal malpractice case is economically viable. For instance, if the potential client's damages are \$7,500, then it will not make economic sense for the client to hire us because the dispute can be resolved in small claims court without an attorney.

Is there a fee agreement between the client and the lawyer? Does that fee agreement provide for binding arbitration? Does that fee agreement provide that the prevailing party is entitled to attorney's fees? The answers to these questions impact where the case will be filed, the expenses to pursue the case, and the economic viability of the case.

We determine economic viability before discussing the facts of the case because if the case does not make economic sense, then talking about the details of what happened is not productive.

Litigation is very expensive. We are typically not a good fit unless there are millions of dollars at stake and the potential defendant has sufficient assets to pay those damages. When you interview us, we will tell you whether it makes economic sense to hire us given the amount in dispute and anticipated cost to pursue the case.

### **Focus on Collection**

If there is no reasonable hope of collecting the damages from the malpracticing attorney, then why pursue the claim? We will ask you if the attorney you want to sue is a solo practitioner or a member of a large firm. The answer impacts the economic viability of the case.

For instance, if the malpracticing attorney is a solo practitioner and caused a client to suffer a \$50 million loss, then it is unlikely that the attorney has sufficient malpractice coverage to pay for those damages. Therefore, unless the attorney has a substantial net worth that the client can verify, it probably will not make economic sense to pursue a malpractice case.

There is no requirement that attorneys carry malpractice insurance. And many attorneys do not carry sufficient legal malpractice insurance coverage. There is typically no way to verify the amount of insurance the attorney has until the client files suit and conducts discovery.

### **The Statute of Limitations**

The statute of limitations for clients' claims (except fraud) against former counsel is one year. For an explanation of how that statute generally works, please read this article: [Navigating the One-Year Statute of Limitations for Legal Malpractice Claims](#).

We will ask you when you believe the attorney-client relationship ended, and that date is frequently determinative of whether the potential legal malpractice case is timely. When the answer is unclear, we will ask you to look at the invoices the attorney sent you to see when the attorney last billed you for substantive work and correspondence the lawyer sent you to see when the lawyer last provided substantive advice.

### **Your Obligation to Mitigate Damages**

Victims of malpractice (like victims of personal injury) must take reasonable steps to mitigate (i.e., take steps to reduce) their damages. So, if your lawyer makes a mistake that causes you to suffer damages and there is something reasonable that you can do to reduce or eliminate those damages, then you must do it, or you will not be able to recover those avoidable damages. When you call us, and we learn there might be things you can do to reduce your damages, then we may suggest you take those steps before you hire us.

### **Mistakes Don't Equal Malpractice**

Many clients believe that if their lawyer made a mistake, that necessarily means the lawyer is liable for malpractice. But that's not the case. Lawyers make mistakes all the time. Often those mistakes do not impact the outcome of the client's matter. And if the lawyer's mistake does not impact the client's matter, then the lawyer likely has not committed malpractice.

### **The Essence of Legal Malpractice**

To win a legal malpractice case, a client must prove that (1) the lawyer fell below the community standard of care, and (2) the client would have achieved a better result if the lawyer met the standard of care. If the result (that the client is upset about) would have happened, even if the lawyer met the standard of care, then the client cannot prove malpractice. This test applies regardless of the type of matter that you hired the lawyer to handle.

### **Can you sue the other side's attorney?**

Frequently, clients feel wronged by the conduct of the opposing side and want to know if they can sue the other side's attorney. The answer is almost always no. Lawyers owe duties to their own clients, not another attorney's clients.

### **Are there circumstances when a client can sue an attorney that did not represent the client?**

The answer is yes. When an attorney performs work that is clearly intended to benefit someone other than the client, then sometimes that third party can file a claim against a negligent attorney (e.g., when a lawyer negligently prepares a will that fails to accomplish the client's wish to benefit an heir). Additionally, lawyers cannot defraud nonclients and can sometimes become fiduciaries if they receive money on nonclients' behalf.

## **Expenses associated with pursuing legal malpractice cases**

Legal malpractice cases are some of the most expensive cases that clients pursue. Lawyers do not take getting sued well. Often, they are willing to spend more money and time defending themselves than other litigants. If they have malpractice insurance, then they litigate with the insurance company's dollars. Expert witnesses are almost always required to prove malpractice. If the malpractice took place in litigation, then the client frequently must redo that case to show that competent counsel would have won it. Often, other experts are required to prove the client's malpractice case, further increasing the expense.

## **Lost Punitive Damages**

Sometimes, clients are angry that their former attorneys failed to obtain punitive damages for them. But clients cannot recover lost punitive damages in legal malpractice cases.

## **Fee options**

Klein & Wilson LLP is willing to consider legal malpractice cases on an hourly fee basis, contingency fee basis, and hybrid (part hourly and part contingency fee) basis. However, most cases do not meet our criteria for contingency fee and hybrid cases. Please call us to discuss your case, and we will determine if we are a good fit for it.