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Malpractice Damages — CA v. WA:

Comparing Important Aspects of Professional Liability Standards

By Nicholas Larson

As a Seattle native and resident who spent most of the last decade living in San Francisco, I am often asked two questions: Who is your favorite NFL team (hint: they wear blue) and what is the biggest difference between the two cities? While the answer to the second question keeps changing (the answer to the first does not), the frequency of these questions has increased recently as more people and companies are migrating from San Francisco to Seattle.

While many of these individuals and companies are thriving doing business up and down the west coast, those professionals in the field of law should be aware that California and Washington, while similar, have a few substantial differences in regard to professional practice standards, particularly in the area of professional liability.

Two recent changes in Washington case law illustrate these differences and impact how and to what extent legal malpractice actions can proceed in Washington as compared to California. In order to establish a claim for legal malpractice, a plaintiff must prove: (1) duty; (2) breach; (3) proximate causation; and (4) damages.[1] These basic elements are the same in both jurisdictions; however, California and Washington differ in professional liability when it comes to particular aspects of causation and damages.

Collectibility as an Affirmative Defense

One such difference is collectibility. The Washington Supreme Court, in *Schmidt v. Coogan*,[2] waded into an undecided area of law in legal malpractice — specifically, collectibility of the underlying case.[3]

The traditional rule, used in California, is that the plaintiff has to prove collectibility in the underlying action. The Washington Supreme Court, though, disagreed with the majority rule and instead went with a recent trend in the national case law, by making collectibility in the underlying case an affirmative defense that the defendant (attorney) must prove.

This decision was based almost exclusively on public policy. The Court found:

> **First**, the traditional approach unfairly presumes that an underlying judgment is uncollectible when the record is silent…. **Second**, the negligent attorney is in as good a position, if not better, than the client to discover and prove uncollectibility…. **Third**, the traditional approach has the unfortunate effect of introducing evidence of liability insurance into every legal malpractice case…. **Fourth**, a delay usually, if not always, ensues between the original injury and the legal malpractice action…. **Fifth**, clients are further burdened because requiring them to prove collectibility ignores the fact that judgments are valid for 10 years after entry in Washington and may be renewed thereafter…. **Sixth**, placing the burden of disproving collectibility on the negligent attorney acknowledges the important fiduciary relationship between client and attorney.[4]

The Washington Supreme Court contrasted these policy concerns with the prevailing reasoning supporting the majority rule, finding: "The traditional approach rests primarily on the theory that it is consistent with tort law: plaintiffs may recover only the amount that will make them whole (and not a windfall), and the plaintiff must prove both proximate cause and injury."[5]

The traditional approach is used in California where collectibility is the plaintiff's burden in a legal malpractice action. Understanding the new standard in Washington, as well as the difference from the majority rule used in California, can help attorneys select and navigate cases with clients doing business in multiple jurisdictions on the west coast.

The Availability of Emotional Distress Damages

Another difference between California and Washington can be found in regard to emotional distress damages. Such damages are recoverable in Washington, but in a bit broader manner than in California.

Again, in *Schmidt v. Coogan*, the Washington Supreme Court decided a novel legal issue — whether emotional distress damages are available in legal malpractice actions:

> Originally, we adopted a general rule of "no liability for mental distress" when a "defendant's actions were negligent and there was no impact

to the plaintiff....” However, we departed from this rule and now allow recovery when a plaintiff’s emotional distress is “within the scope of foreseeable harm ..., a reasonable reaction given the circumstances, and ... manifest by objective symptomatology.”[6]

This change in the standard in Washington meant that the Court needed to set forth the specific test to be used to determine if such emotional distress damages were available. It did, stating, “[E]motional distress damages are available for attorney negligence when emotional distress is foreseeable due to the particularly egregious (or intentional) conduct of an attorney or the sensitive or personal nature of the representation.”[7]

However, the Court denied Schmidt such damages, finding:

> Here, the facts do not warrant damages for emotional distress. Schmidt experienced a pecuniary loss when Coogan negligently failed to perfect her personal injury lawsuit, and this lawsuit compensates her for that loss. Additionally, the subject matter of the litigation was not particularly sensitive: she did not lose her freedom and Coogan’s actions were not egregious.[8]

In contrast, in California emotional distress damages are generally limited to rare instances, including the deprivation of a liberty interest. Emotional distress damages ordinarily are not recoverable when a lawyer’s misconduct causes the client to lose profits from a commercial transaction, but ordinarily are recoverable when misconduct causes a client’s imprisonment.[9]

In short, the broader standard for emotional distress damages in Washington is in contrast to the narrower rule used in California, just as the Washington collectibility standard differs from the traditional rule in California. Attorneys practicing in these jurisdictions should be aware of these and other differences, so that they can select and navigate cases with clients doing business in multiple jurisdictions on the west coast. ■

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[1] *Hecht, Solberg, Robinson, Goldberg & Bagley, LLP v. Superior Court*, 137 Cal. App. 4th 579, 590 (6th. Dist. 2006); *Ang v. Martin*, 154 Wn. 2d 477, 482 (2005).

[2] 181 Wn. 2d 661 (2014).

[3] **Editor’s Note:** In *Schmidt*, the attorney failed to file and serve the client’s personal injury case within the three-year statute of limitations. In cases of legal malpractice involving a lawyer’s failure to diligently and ethically pursue a client’s case, the client-plaintiff must prove “the case within the case,” *i.e.*, that had the case been diligently and ethically pursued, the client-plaintiff would have prevailed. With respect to damages, the court also considers whether a judgment against the defendant would have been collectible. This was the central issue in *Schmidt*.

[4] *Schmidt*, 181 Wn.2d at 666–68 (emphasis added).

[5] *Id*. at 666 (citations omitted). *See also, e.g., DiPalma v. Seldman*, 27 Cal. App.4th 1499 (1994).

[6] *Schmidt*, 181 Wn.2d at 671 (citing *Hunsley v. Giard*, 87 Wn.2d 424, 432, 553 P.2d 1096 (1976); *Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 560, 293 P.3d 1168 (2013)).

[7] *Id*. at 674.

[8] *Id*.

[9] *See, e.g., Pleasant v. Celli*, 18 Cal. App. 4th 841 (1993); *Smith v. Superior Court*, 10 Cal. App. 4th 1033 (1992).