LEGAL MALPRACTICE AND THE CRIMINAL DEFENSE ATTORNEY

By Peter L. Ostermiller

Occasionally, a defendant, while incarcerated and apparently having nothing better to do, will file a Motion under RCr. 11.42, or file some other form of post-conviction collateral relief such as habeas corpus, Section 2255 Motion, etc. On occasion, the dissatisfied defendant might even file a Bar Complaint with the Kentucky Bar Association. Typically, these avenues of relief are filed by the defendant pro se and allege some form of ineffective assistance of counsel.

A much more unlikely avenue which may be pursued by the dissatisfied defendant is a legal malpractice action against the defense attorney. There are various legal and practice reasons why legal malpractice actions against a defense attorney are somewhat rare. According to a 1986 study by the ABA, legal malpractice claims against criminal defense attorneys represented only 3% of all malpractice claims.

It is the purpose of this article to discuss the various practical and legal concerns that make such malpractice actions usually unsuccessful. A majority of the states which have addressed this issue have imposed various procedural obstacles around which the defendant must successfully navigate in order to pursue a legal malpractice case. Unquestionably, a defense attorney has various procedural and substantive defenses available to him or her which are not enjoyed by the civil practitioner. These defenses are primarily driven by public policy concerns which are generally not applicable in the civil context.

Although it is not the purpose of this article to go into any great length concerning general legal malpractice principles, a brief review of some basic legal malpractice considerations is appropriate. In Mitchell v. Transamerica Insurance Company,[1] the Kentucky Court of Appeals

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held that the plaintiff in a legal malpractice case must show that the attorney's alleged wrongful conduct deprived the plaintiff "of something to which he would otherwise be entitled." And, in Coffey v. Jefferson County Board of Education,[2] the Court of Appeals held that the plaintiff must establish that the alleged negligent conduct "resulted in specific damage to the client."

The types of complaints that are typically made against the criminal defense attorney fall into the following general categories:

(1) Inadequate grand jury representation;

(2) Inadequate or improper pretrial preparation and investigation;

(3) Inadequate presentation of defense;

(4) Failure to consult with or advise client;

(5) Failure to appear on behalf of client;

(6) Bad advice, or failure to advise client, of guilty plea offers or offers of immunity;

(7) Bad advice about the law;

(8) Conflicts of interest;

(9) Failure to file post verdict Motions or Appeals, or other post-conviction remedies;

(10) Failure to keep client information confidential;

and

(11) Improper or untimely withdraw or threat to withdraw from representation.

PUBLIC DEFENDERS/COURT-APPOINTED COUNSEL

Civil Rights actions under 42 U.S.C. Section 1983, against public defenders or court-appointed counsel are typically unsuccessful. In Polk County v. Dodson[3], the United States Supreme Court held that a public defender is not a "state actor" acting under color of state law when the attorney undertakes defense representation of an indigent criminal defendant. This same reasoning has also been applied to court-appointed defense attorneys.[4]

However, in 1984, the United States Supreme Court, while offering little practical guidance, held in Tower v. Glover[5] that a public defender may be subject to a 1983 Civil Rights suit if the defendant alleges that the defense attorney conspired with state officials to deprive the defendant of federal rights.

Additionally, the Seventh Circuit has held that federal public defenders are immune by federal statue from legal malpractice lawsuits.[6] The Seventh Circuit reasoned that federal public defenders are covered by the Westfall Act amendment to the Federal Tort Claims Act.[7] That Amendment to the Federal Tort Claims Act provides that federal employees acting within the scope of their employment are not subject to suit.

STANDARD OF CARE

In Simko v. Blake,[8] the Michigan Supreme Court discussed the standard of care to be exercised by a defense attorney. In that case, the defendant accused his prior counsel of not doing enough to investigate or prepare his case for trial. The defendant was convicted of cocaine possession and firearms charges, spent two years in prison, at which time his conviction was reversed on Appeal through new counsel. The Michigan Supreme Court held that the actions of the attorney in not calling certain witnesses represented, at most, errors of judgment in trial strategy and

did not constitute legal malpractice. The Court reasoned that the attorney did not have a duty to insure or guarantee the most favorable outcome for the defendant. The Court held that a defense attorney is never bound to exercise extraordinary diligence, or to act beyond the knowledge, skill and ability ordinarily possessed by the average practitioner of law.

Although the Court did not address the issue of the defense attorney who holds himself out as an expert in a particular filed, such an attorney would no doubt he held to the higher standard of care for an expert in that field, just as physicians who specialize in a particular field are held to a higher standard of care.

Defendant's Guilt As A Defense

A major bar to most legal malpractice actions against defense attorneys is the defendant's guilt. The absence of guilt, (or, said another way, the innocence of the defendant) is typically a condition precedent to a legal malpractice suit. This defense is the result of public policy concerns unique to criminal cases. The defense would presumptively apply in those cases in which the defendant has plead guilty, and thereafter sought to get out of the guilty plea by alleging ineffective assistance by the defense attorney in the plea negotiations.

A majority of the Court's which have addressed this issue have concluded that it is against public policy to allow a convicted person to bring a legal malpractice lawsuit without first proving the defendant's innocence.[9]

Collateral Estoppel

Collateral estoppel is a fairly common defense available when the subject matter of the legal malpractice suit has also been the subject of previous proceedings. In Roberts v. Wilcox,[10] the Kentucky Court of Appeals stated that there was "no question but that a criminal conviction can

be used for purposes of collateral estoppel in a later civil action." Although the civil suit in Roberts was a declaration of rights suit, the underlying principle would be equally applicable in a legal malpractice action.

Given the various procedures by which a criminal defendant may collaterally attack his conviction on the grounds of ineffective assistance of counsel, the collateral estoppel defense is particularly appropriate in legal malpractice cases against criminal defense attorneys. This collateral estoppel defense would generally be available given the very small numbers of such collateral proceedings in which the Court finds that there was ineffective assistance of counsel. For example, a study of approximately 4,000 federal and state appellate decisions between 1970 and 1993 alleging ineffective assistance of counsel showed that only 3.9% resulted in the Court finding ineffective assistance of counsel.[11]

Perhaps the most recent application of this defense in a reported decision is found in the December 2, 1996 decision of the California Court of Appeals in Younan v. Caruso.[12] In that case, the defendant was convicted of molesting his step-daughter and was sentenced to prison. The defendant thereafter filed a habeas corpus petition alleging ineffective assistance of counsel on the ground, in part, that his defense attorney had failed to call expert witnesses. The habeas corpus petition was denied after the Court held an evidentiary hearing. The defendant thereafter filed a legal malpractice case against the defense attorney. The defendant contended that his malpractice claim should not be collaterally estopped because the standard of proof and burden of proof in the habeas corpus case was different than in the malpractice case. However, the California Court of Appeals turned the defendant's argument against him, by holding that the defendant had a greater interest in

pursuing the habeas corpus proceeding, where his liberty was at stake, than he had an interest in the malpractice case were only monetary damages were at issue. Therefore, if the defendant had not been able to prove ineffective assistance of counsel when his liberty was at stake, he would not be able to prove it was lesser interests were at stake.

Since the standard for determining ineffective assistance of counsel under the United States Supreme Court's 1984 decision in Strickland v. Washington,[13] is essentially the same as the legal malpractice standard of care, a collateral proceeding determination that the defense attorney did not render ineffective assistance of counsel is typically fatal to the defendant's legal malpractice claim.[14]

CONCLUSION

The criminal defense attorney, in a legal malpractice action, is the beneficiary of public policy defenses not typically available to civil practitioners. No doubt, as a practical matter, while a defendant may be able to pursue pro se collateral criminal proceedings alleging ineffective assistance of counsel, an incarcerated defendant has very real practical and legal problems in attempting to pursue a civil malpractice lawsuit against his previous defense attorney.

1.Mitchell v. Transamerica Insurance Company, Ky. App., 551 S.W.2d 586, 588 (1977)

2.Coffey v. Jefferson County Board of Education, Ky. App., 756 S.W.2d 155, 156 (1988)

3.Polk County v. Dodson, 454 US 312, 324-25 (1981)

4.Black v. Bayer, 672 F.2d 309, 314 (3rd Cir. 1982)

5.Tower v. Glover, 467 U.S. 914, 920, 923 (1984)

6.Sullivan v. United States, 21 F.3d 198 (7th Cir. 1984)

7.28 U.S.C. Sections 1346(b), 2671-80

8.Simko v. Blake, Michigan Supreme Court, No. 97579, rendered May 22, 1995.

9.A collection of case law on this issue and a brief discussion is found in "Only Innocent Clients Can Sue Criminal Lawyers: Trend Protects Defense Attorneys From Malpractice Suits," Lawyers Weekly U.S.A., September 25, 1995, p. B5.

10.Robert v. Wilcox, Ky. App., 805 S.W.2d 152, 153 (1991)

11.Richard Klein, "The Emperor Gideon Has No Clothes: The Empty Promise Of The Constitutional Right To Effective Assistance Of Counsel," 13 Hastings Const. L.Q.625, 632 (1986).

12.Younan v. Caruso, California Court of Appeals, Second District, No. B088348, rendered December 2, 1996.

13.Strickland v. Washington, 466 U.S. 668 (1984)

14.See, e.g., Gebhardt v. O'Rouke, 491 N.W.2d 249 (Mich.App. 1992) and Johnson v. Raban, 702 S.W.2d 134 (Mo.App. 1985)

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