

## Gordon & Rees National Professional Liability Webinar Series

Our insightful leaders share the latest trends and laws that impact professional liability defense.



**Thank You For Attending.  
The Webinar Will Begin Shortly.**

**If you have any questions,  
please use the **Q&A** box on the  
right side of your screen.**



# Evaluating Damages in a Legal Malpractice Claim

Presented by: Susan Taylor Wall and Hal Frampton

**A webinar brought to you as part of  
the Gordon & Rees  
National Professional  
Liability Webinar Series**

**Our insightful leaders share the latest trends and  
laws that impact professional liability defense.**



- Complimentary, one-hour webinars by Gordon & Rees professional liability attorneys
- Discussion of malpractice and ethical topics relevant to all practice areas

# Questions?

Use the **Q&A** box found  
on the upper right side  
of your screen.

# Presenters



Susan Taylor Wall



Hal Framton

**GORDON&REES**  
SCULLY MANSUKHANI

# Overview

A key to successfully resolving many malpractice claims is countering plaintiff's damages theory with a rigorous assessment of the damages available. Developing a persuasive damages evaluation involves considering the following subjects:

- Liability Analysis – discount for potential defense verdict / summary judgment on some or all issues
- Direct Damages – hard losses allegedly caused by the malpractice
- Emotional / Non-Economic Damages – depends on state's application of economic loss rule
- Consequential Damages – more attenuated losses allegedly caused by the malpractice
- Punitive Damages – depends on the potential degree of fault

# Liability Analysis

Damages assessment should account for weaknesses identified in the liability assessment. Common uses of liability assessment include:

- Overall discount on damages to account for probability of defense verdict or summary judgment (more useful on simple cases)
- Discount damages associated with particular claims because of weaknesses under the facts/law
- Discount particular items of damage because of probability that plaintiff cannot prevail (e.g., discount on lost profits claim because of weaknesses / flaws in lost profits evidence)
- Discount related to alleged acts or omissions of co-defendant or other third party (e.g., defending case arising out of real estate closing in which closing attorneys, real estate agent, lender, and insurance agent are all parties)



# Direct Damages

In a tort action, there is typically no hard and fast distinction between direct and other types of damages. However, for our purposes, "[d]irect damages are those damages which are the immediate, natural and anticipated consequences of the wrong." *Mallen & Smith, Legal Malpractice § 21:1 (2017)*. In legal malpractice actions, the following types of direct damages are common.

## Value of the Underlying Claim

When the alleged malpractice negatively affected the client's claims in the underlying matter, direct damages typically consist of the value of the claims lost. In other words, the plaintiff can recover:

- Amount the plaintiff would have recovered but for the alleged malpractice
- Less any monies that were actually recovered
- Plus any expenses incurred because of the alleged malpractice.

In valuing the underlying claim, consider:

- Strength of the underlying claim
- Proper measure of damages in the underlying claim
- Amount of insurance coverage available on the underlying claim
- Whether and to what extent the underlying claim was collectable

## Punitive / Exemplary Damages

The majority rule is that a legal malpractice plaintiff cannot recover from the allegedly negligent lawyer punitive / exemplary damages that would have been awarded in the underlying case. The basis for this rule is that punitive damages are not designed to compensate the plaintiff, but rather are designed to punish the bad actor defendant, which purpose is frustrated by making the negligent lawyer (rather than the underlying defendant) liable for such damages. Moreover, it is difficult for a jury to determine the punitive damages that would have been awarded against a defendant who is not actually on trial. See, e.g., *Ferguson v. Loeff, Cabraser, Hiemann & Bernstein*, 69 P.2d 965 (Cal. 2003).

A minority of states, however, permit the recovery of "lost" punitive damages as long as the plaintiff can prove that these damages would have been awarded but for the alleged malpractice. See, e.g., *Jacobson v. Oliver*, 201 F. Supp. 2d 93 (D.D.C. 2002).

## Attorneys' Fees

Generally, the fees expended to prosecute a legal malpractice action are not recoverable under the American rule. However, legal malpractice plaintiffs often pursue attorneys' fees arising out of the underlying matter in the following ways:

- Fees paid to another or a subsequent lawyer. Fees paid to another or subsequent lawyer in the underlying matter may be recoverable as reasonable expenses associated with the plaintiff's attempt to mitigate damages.
- Attorneys' fees as part of the underlying claim. Some states permit legal malpractice plaintiffs to recover attorneys' fees associated with proving the case within a case when the underlying claim carries an entitlement to attorneys' fees. For example, in *Giamann v. St. Paul Fire & Marine Ins.*, 424 N.W.2d 904 (Wis. 1988) the Wisconsin Supreme Court ruled that the plaintiff could recover the fees associated with proving her underlying claim of employment discrimination because the underlying claim would have permitted the recovery of such fees.
- Fees paid to the defendant attorney. States vary widely on how they treat the fees paid to the defendant attorney in the underlying matter. Some courts view the fees paid as a valid measure of damages (e.g., *Carbis Sales, Inc. v. Eisenberg*, 935 A.2d 1238 (N.J. App. Div. 2007)), whereas others view the fees paid to the defendant attorney as irrelevant to the damages suffered (e.g., *Abtetter v. Gibson*, 912 A.2d 424 (Vt. 2006)).

## Value of an Adverse Judgment

When it is alleged that the malpractice led to an adverse judgment against the client, the judgment presumptively sets the measure of damages. However, carriers and attorneys defending malpractice claims should consider:

- Extent to which an adverse judgment could have been prevented
- Negligence of any prior or subsequent counsel (e.g., separate appellate counsel)
- Whether mitigation efforts were or should have been made (e.g., potential for post-judgment settlement)

## Value of Delay

Unless the client actually lost pre-judgment or post-judgment interest awardable on the underlying claim because of the alleged malpractice, courts are typically reluctant to award damages based solely on a client's delay in receiving money. See, e.g., *Tri-G, Inc. v. Burke Bosselman & Weaver*, 856 N.E.2d 389 (Ill. 2006) (court cannot award non-statutory pre-judgment interest).

Nonetheless, some states have suggested that damages based solely on delay may be permissible. For example, in *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 867 N.E.2d 385 (N.Y. 2007), the New York Court of Appeals left open the question of whether a legal malpractice plaintiff may recover interest from the time the plaintiff should have received a favorable judgment in the underlying claim until the actual judgment in the legal malpractice claim.

## Value of Lost or Damaged Property

When the alleged malpractice occurs in a non-litigation matter, the measure of direct damages is generally the value of the benefit the client was seeking via the attorney-client relationship. This can take the form of:

- Physical property the client was seeking to buy or sell
- A transaction the client was attempting to complete
- A matter in which the client was attempting to comply with the law (e.g., attempting to terminate an employee lawfully, attempting to promulgate compliant safety policies or practices)

In defending these claims, it is important to explore fully the actual value of the property or transaction at issue, and the person of that value (if any) that was actually lost because of the alleged malpractice.

## Settlement

A typical measure of damages is the difference between what the plaintiff paid or received in a case and what the plaintiff purportedly would have paid or received in settlement but for the alleged malpractice. For example, a typical claim would be that the plaintiff had a judgment rendered against him in the amount of \$1 million and contends that the case could have been settled for \$250,000 but for the alleged malpractice.

A recurring question—and one to which there is no accepted answer—is the admissibility of settlements and settlement negotiations in the underlying matter. See, e.g., *McDevitt v. Guenter*, 522 F. Supp. 2d 1272 (D. Haw. 2007) (concluding that settlement agreement in underlying actions was inadmissible under Fed. R. Evid. 408 and that damages claimed were therefore speculative).



# Direct Damages

In a tort action, there is typically no hard and fast distinction between direct and other types of damages. However, for our purposes, “[d]irect damages are those damages which are the immediate, natural and anticipated consequences of the wrong.” *Mallen & Smith, Legal Malpractice* § 21:1 (2017). In legal malpractice actions, the following types of direct damages are common.

## *Value of the Underlying Claim*

When the alleged malpractice negatively affected the client's claims in the underlying matter, direct damages typically consist of the value of the claims lost. In other words, the plaintiff can recover:

- Amount the plaintiff would have recovered but for the alleged malpractice
- **Less** any monies that were actually recovered
- **Plus** any expenses incurred because of the alleged malpractice.

In valuing the underlying claim, consider:

- Strength of the underlying claim
- Proper measure of damages in the underlying claim
- Amount of insurance coverage available on the underlying claim
- Whether and to what extent the underlying claim was collectable

## *Value of an Adverse Judgment*

When it is alleged that the malpractice led to an adverse judgment against the client, the judgment presumptively sets the measure of damages. However, carriers and attorneys defending malpractice claims should consider:

- Extent to which an adverse judgment could have been prevented
- Negligence of any prior or subsequent counsel (e.g., separate appellate counsel)
- Whether mitigation efforts were or should have been made (e.g., potential for post-judgment settlement)

## *Value of Lost or Damaged Property*

When the alleged malpractice occurs in a non-litigation matter, the measure of direct damages is generally the value of the benefit the client was seeking via the attorney-client relationship. This can take the form of:

- Physical property the client was seeking to buy or sell
- A transaction the client was attempting to complete
- A matter in which the client was attempting to comply with the law (e.g., attempting to terminate an employee lawfully, attempting to promulgate compliant safety policies or practices)

In defending these claims, it is important to explore fully the actual value of the property or transaction at issue, and the portion of that value (if any) that was actually lost because of the alleged malpractice.

## *Value of Delay*

Unless the client actually lost pre-judgment or post-judgment interest awardable on the underlying claim because of the alleged malpractice, courts are typically reticent to award damages based solely on a client's delay in receiving money.

*See, e.g., Tri-G, Inc. v. Burke Bosselman & Weaver*, 856 N.E.2d 389 (Ill. 2006) (court cannot award non-statutory pre-judgment interest).

Nonetheless, some states have suggested that damages based solely on delay may be permissible. For example, in *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 867 N.E.2d 385 (N.Y. 2007), the New York Court of Appeals left open the question of whether a legal malpractice plaintiff may recover interest from the time the plaintiff should have received a favorable judgment in the underlying claim until the actual judgment in the legal malpractice claim.

## Settlement

A typical measure of damages is the difference between what the plaintiff paid or received in a case and what the plaintiff purportedly would have paid or received in settlement but for the alleged malpractice. For example, a typical claim would be that the plaintiff had a judgment rendered against him in the amount of \$1 million and contends that the case could have been settled for \$250,000 but for the alleged malpractice.

A recurring question—and one to which there is no accepted answer—is the admissibility of settlements and settlement negotiations in the underlying matter. See, e.g., *McDevitt v. Guenter*, 522 F. Supp. 2d 1272 (D. Haw. 2007) (concluding that settlement agreement in underlying actions was inadmissible under Fed. R. Evid. 408 and that damages claimed were therefore speculative).

## Attorneys' Fees

Generally, the fees expended to prosecute a legal malpractice action are not recoverable under the American rule. However, legal malpractice plaintiffs often pursue attorneys' fees arising out of the underlying matter in the following ways:

- *Fees paid to another or a subsequent lawyer.* Fees paid to another or subsequent lawyer in the underlying matter may be recoverable as reasonable expenses associated with the plaintiff's attempt to mitigate damages.
- *Attorneys' fees as part of the underlying claim.* Some states permit legal malpractice plaintiffs to recover attorneys' fees associated with proving the case within a case when the underlying claim carries an entitlement to attorneys' fees. For example, in *Glamann v. St. Paul Fire & Marine Ins.*, 424 N.W.2d 924 (Wis. 1988) the Wisconsin Supreme Court ruled that the plaintiff could recover the fees associated with proving her underlying claim of employment discrimination because the underlying claim would have permitted the recovery of such fees.
- *Fees paid to the defendant attorney.* States vary widely on how they treat the fees paid to the defendant attorney in the underlying matter. Some courts view the fees paid as a valid measure of damages (e.g., *Carbis Sales, Inc. v. Eisenberg*, 935 A.2d 1236 (N.J. App. Div. 2007)), whereas others view the fees paid to the defendant attorney as irrelevant to the damages suffered (e.g., *Bloomer v. Gibson*, 912 A.2d 424 (Vt. 2006)).



## *Punitive / Exemplary Damages*

The majority rule is that a legal malpractice plaintiff cannot recover from the allegedly negligent lawyer punitive / exemplary damages that would have been awarded in the underlying case. The basis for this rule is that punitive damages are not designed to compensate the plaintiff, but rather are designed to punish the bad-actor defendant, which purpose is frustrated by making the negligent lawyer (rather than the underlying defendant) liable for such damages. Moreover, it is difficult for a jury to determine the punitive damages that would have been awarded against a defendant who is not actually on trial. See, e.g., *Ferguson v. Lieff, Cabraser, Hiemann & Bernstein*, 69 P.2d 965 (Cal. 2003).

A minority of states, however, permit the recovery of “lost” punitive damages as long as the plaintiff can prove that these damages would have been awarded but for the alleged malpractice. See, e.g., *Jacobson v. Oliver*, 201 F. Supp. 2d 93 (D.D.C. 2002).

### Emotional Distress

Traditionally, most courts were reluctant to award the recovery of emotional distress damages in legal malpractice cases. Courts are not yet sure whether general rules in non-malpractice, personal injury torts govern the recovery of pure emotional distress damages in malpractice cases under a variety of theories, including:

- Whether emotional distress is a foreseeable result of negligent behavior.
- Whether a lawyer can be held liable for emotional distress damages not caused, in part, by the client or by the client's conduct which may or may not be foreseeable.

- Lawyer negligently allowed non-lawyer staff to sue his client. *Boyd v. J.P. Morgan & Co. LLC*, 100 F.3d 1002 (2d Cir. 1997).
- Lawyer negligently failed to engage in litigation. *Boyd v. J.P. Morgan & Co. LLC*, 100 F.3d 1002 (2d Cir. 1997).

- Plaintiff not caused client to be distressed and emotional then lawyer - can the negligence not be held to be the cause. *Winters v. Sisk*, 687 F.2d 1012 (10th Cir. 1982).

- Other cases involving emotional distress damages by a breach of general tortious duty on the basis of their duty, but not negligence, and loss of liberty.

### Reputational Harm

Courts have traditionally been somewhat more open to awarding damages for reputational harm, but jurisdictions still vary widely. Some require minimal, visible exposure to conduct, whereas others permit the recovery of reputational harm for mere negligence. Generally, courts may not be persuaded by just a close connection between the reputational loss and the alleged malpractice. Types of cases that have resulted in reputational awards include:

- Unintentional publication of plaintiff's crimes for coverage of court.
- Client thought attorney had obtained a void divorce, remarried, and faced potential criminal penalties for bigamy.
- Courts seem particularly likely to permit reputational harm claims when the underlying claim is for professional negligence (i.e., injury to a physician's reputation for medical malpractice suits).

# Consequential Damages

### Lost Income / Profits

Generally, a damages expert needs to be retained to address any lost profits calculation. In seeking a damages expert, it is important to consider the expert's:

- Experience in the specific industry (e.g., it is easier to attack plaintiff's assumptions if the expert knows the industry).
- Experience with the plaintiff's expert.
- ABV or other accreditation.

Consider whether to produce an alternative lost profits calculation or simply to attack the plaintiff's calculation.

### Lost Income / Profits

Nevertheless, courts have permitted the recovery of lost profits in some cases. However, it is important to fully evaluate any claim for lost profits, including our ability:

- The assumptions on which the lost profits calculation is based, such as:
  - Market conditions (have they assumed particularly busy market conditions?)
  - Governmental approvals or events.
  - Cost of sales (profit margin to be lost is low?)
  - Expenses (e.g., have they held expenses flat even though existing and sales have increased?)
  - Non-prod. lines or products.
  - Credit approval and interest rates.
  - Continued sales of an obsolete product.

- If and how they have dissipated to present value.

- The extent to which lost profits are attributable to other potential defendants.

- The extent to which lost profits will be determined by external events outside the chain of causation.

### Lost Income / Profits

Lost income / profits are often the largest item of claimed damages in a malpractice action involving a business transaction. In determining a malpractice claim, courts will normally consider that any claimed lost income or profits are speculative, and courts often require a case particular to particularly likely to be held speculative if the defendant can prove that:

- The alleged lost profits are from a new business or product. (*Clay v. Lee Molecules Corp.*, 650 N.E.2d 423 (Ind. Ct. App. 2004)).
- The alleged lost profits are based on a speculative occurrence, such as pending or some other discretionary governmental decision. (*Redstone Assoc., Inc. v. Roper Industries*, 1 P.3d 718 (Wyo. 2001)).
- Plaintiff lacks a qualified / reliable expert to testify as to lost profits.



# Consequential Damages

## Emotional Distress

Traditionally, most courts were reluctant to permit the recovery of emotional distress damages in legal malpractice action, particularly without some attendant physical injury. In recent years, however, courts have permitted the recovery of pure emotional distress damages in more and more cases under a variety of theories, including:

- Emotional distress was a foreseeable result of egregious behavior. *Schmidt v. Coogan*, 335 P.3d 424 (Wash. 2014) (emotional distress damages not awarded, but the Court set forth circumstances under which they would be permissible)
- Lawyer recklessly allowed non-lawyer staff to run his cases. *David C. Joel, Attorney at Law, P.C. v. Chastain*, 562 S.E.2d 746 (Ga. 2002)
- Lawyer advised client to engage in immigration fraud, and client was caught. *DePape v. Trinity Health Systems, Inc.*, 242 F. Supp. 2d 585 (N.D. Iowa 2003)
- Negligence caused client to be deported and separated from family – note the negligence was **not** found to be egregious. *Miranda v. Said*, 840 820 N.W.2d 159 (Iowa Ct. App. 2012)
- Other cases permitting emotional distress damages have involved personal losses, such as the loss of child custody, loss of an adoption, and loss of liberty.

## *Reputational Harm*

Courts have traditionally been somewhat more open to awarding damages for reputational harm, but jurisdictions still vary widely. Some require intentional and/or egregious conduct, whereas others permit the recovery of reputation harm for mere negligence. Generally, courts require foreseeability and a close connection between the reputational loss and the alleged malpractice. Types of cases that have resulted in reputational awards include:

- Widespread publication of plaintiff's citation for contempt of court
- Client thought attorney had obtained a valid divorce, remarried, and faced potential criminal penalties for bigamy
- Courts seems particularly likely to permit reputational harm claim when the underlying claim is for professional negligence (i.e., injury to a physician's reputation for medical malpractice verdict)



## *Lost Income / Profits*

Lost income / profits are often the largest item of claimed damages in a malpractice action involving a business transaction. In defending a malpractice claim, counsel will normally contend that any claimed lost income or profits are speculative, and courts often agree. A lost profits claim is particularly likely to be held speculative if the defendant can show that:

- The alleged lost profits are from a new business or product (*Clary v. Lite Machines Corp.*, 650 N.E.2d 423 (Ind. Ct. App. 2006))
- The alleged lost profits are based on a speculative occurrence, such as permitting or some other discretionary governmental decision (*Britestarr Homes, Inc. v. Piper Rudnick LLP*, 453 F. Supp. 2d 521 (D. Conn. 2006))
- Plaintiff lacks a qualified / reliable expert to opine as to lost profits

## *Lost Income / Profits*

Nonetheless, courts have permitted the recovery of lost profits in many cases. Therefore, it is important to fully evaluate any claim for lost profits, including considering:

- The assumptions on which the lost profits calculation is based, such as
  - Market conditions (have they assumed particularly rosy economic conditions?)
  - Governmental approvals or events
  - Level of sales growth (compared to historical levels)
  - Expenses (e.g., have they held expenses flat even though inventory and sales are increasing?)
  - New product lines or suppliers
  - Credit approval and interest rates
  - Continued sales of an obsolete product
- If and how they have discounted to present value
- The extent to which lost profits are attributable to other potential defendants
- The extent to which lost profits will be determined by external events outside the chain of causation



## *Lost Income / Profits*

Generally, a damages expert needs to be retained to address any lost profits calculation. In seeking a damages expert, it is important to consider the expert's:

- Experience in the specific industry (e.g., it is easier to attack plaintiff's assumptions if the expert knows the industry)
- Experience with the plaintiff's expert
- ABV or other accreditation

Consider whether to produce an alternative lost profits calculation or simply to attack the plaintiff's calculation.

# Punitive / Exemplary Damages

While punitive / exemplary damages are available in most jurisdictions for a legal malpractice case, the circumstances under which they are available vary widely. Some jurisdictions require intentional and/or fraudulent conduct, whereas others merely require gross negligence. Likewise, whether the attorney's E&O policy can cover punitive damages varies by jurisdiction. Therefore, in defending a legal malpractice action, it is important to identify early on the circumstances under which punitive damages are available and whether the case bears a meaningful risk of punitive damages. Of course, any coverage issues under the E&O policy must be handled by separate counsel.

# Questions? Comments?



Susan Taylor Wall  
[swall@grsm.com](mailto:swall@grsm.com)



Hal Frampton  
[hframpton@grsm.com](mailto:hframpton@grsm.com)

- 
- MCLE Credit available in California, and in states with reciprocity agreements.
  - Email [proflibilitywebinars@gordonrees.com](mailto:proflibilitywebinars@gordonrees.com) to inquire.

May 16, 2018

*Topic: TBA*

Register online: [proflibilitywebinars.gordonrees.com](http://proflibilitywebinars.gordonrees.com)

NY CLE Code: GR0318

**GORDON&REES**  
SCULLY MANSUKHANI