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This Week's Feature

Malpractice vs. Misconduct

by Dina M. Cox and Neal Bowling, Lewis Wagner, LLP, Indianapolis, IN

Suppose your client, a lawyer, has been sued for malpractice. Could the alleged malpractice be a basis for discipline? Alternatively, is a disciplinary complaint likely to give rise to a malpractice suit? This article will attempt to shed some light on the distinction between attorney malpractice on one hand and professional misconduct on the other, as well as the types of conduct that may constitute both.

1. What is attorney malpractice?

Simply stated, attorney malpractice is a failure to exercise ordinary skill and knowledge, where that failure damages a client. "To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney 'failed to exercise the ordinarily reasonable skill and knowledge commonly possessed by a member of the legal profession'; and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages." *Schurz v. Bodian*, 2012 WL 502680, *1 (N.Y. App. Div. 2012) (internal citations omitted). See also *Legacy Healthcare, Inc. v. Barnes & Thornburg*, 837 N.E.2d 619, 624 (Ind. Ct. App. 2006). (attorney malpractice claim involves "failure of the attorney to exercise ordinary skill and knowledge (the breach of the duty).").

2. What is attorney misconduct?

By contrast, attorney misconduct is the failure to comply with the rules of conduct adopted by a court to which an attorney has been admitted to practice. Because all states except California have adopted some version of the American Bar Association's Model Rules of Professional Conduct (the "Rules of Professional Conduct"), they will be the focus of this article. A failure to abide by the rules subjects the attorney to discipline by the highest court of that jurisdiction. "Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process." Rules of Professional Conduct, Preamble, ¶ 19. See also Rule 9, American Bar Association's Model Rules for Disciplinary Enforcement ("Enforcement Rules") ("It shall be a ground for discipline for a lawyer to: (1) violate or attempt to violate the [State Rules of Professional Conduct], or any other rules of this jurisdiction regarding professional conduct of lawyers..."). The Enforcement Rules also provide for discipline for refusal to cooperate in the disciplinary process itself. See Enforcement Rule 9 (3), providing for discipline for disobeying a subpoena or order from a bar disciplinary authority.

Of course, the potential consequences of an attorney discipline case are very different from those of an attorney malpractice case. In the worst outcome of an attorney malpractice case, the attorney must pay monetary damages to the plaintiff. By contrast, attorney discipline actions place the attorney's law license in jeopardy. An attorney who has been found to have violated the Rules of Professional Conduct faces a range of

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sanctions from a private reprimand up to disbarment, depending on the severity of the violation. See Enforcement Rule 10.

3. Does malpractice equal misconduct, or vice versa?

As noted above, attorney malpractice occurs where an attorney fails to exercise ordinary skill and care, and thereby causes damage to a client. Rule of Professional Conduct 1.1 provides "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Furthermore, Rule of Professional Conduct 1.3 provides "A lawyer shall act with reasonable diligence and promptness in representing a client."

Thus, it would seem that Rule 1.1 and Rule 1.3 may codify the requirement that an attorney exercise ordinary skill and care, and that failure to do so may constitute misconduct as well as malpractice. It is difficult to imagine a failure to exercise ordinary skill and care that is not also a failure to employ the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Some courts have indeed treated isolated mistakes as misconduct and punished it accordingly. For instance, in *Board of Professional Responsibility, Wyoming State Bar v. Vreeland*, 2012 WL 662236 (Wyo. 2012), an attorney represented a client in a criminal trial. *Id.* at *1. The jury returned a conviction on February 4, 2010. Wyoming Rule of Criminal Procedure 29(c) required that a motion for judgment of acquittal be made within 10 days of the jury's verdict, and Rule 33(b) required a motion for new trial to be filed within 15 days of the verdict. However, Vreeland did not file the motions for judgment of acquittal and for a new trial until March 3, 2010; hence, the motions were untimely. *Id.* The Wyoming Supreme Court found that Vreeland violated Rules 1.1 and 1.3 of the Wyoming Rules of Professional Conduct (based on the Model Rules) and imposed a sanction of public censure. *Id.* at *2. See also *Board of Professional Responsibility, Wyoming State Bar v. Dunn*, 262 P.3d 1268 (Wyo. 2011) (attorney received public reprimand for failing to file timely governmental claims notice and complaint); *In the Matter of Brown-Williams*, 2012 WL 366587 (Ga. 2012) (attorney received public reprimand for missing statute of limitations in workers' compensation case).

By contrast, some courts have explicitly held that an isolated mistake is not a proper basis for discipline. For instance, in *In the Matter of the Application for Disciplinary Action Against William E. McKechnie*, 656 N.W.2d 661 (N.D. 2003), the Supreme Court of North Dakota addressed a mistake similar to the mistake made by Vreeland, but found that the mistake did not constitute misconduct. "In this case, McKechnie gave Follman incorrect legal advice about the statute of limitations and Follman's case was dismissed for failure to file within the limitations period. This evidence shows nothing more than an isolated instance of ordinary negligence, or error of judgment. We conclude there is no clear and convincing evidence that McKechnie violated N.D.R. Prof. Conduct 1.1." *Id.* at 669.

Even in jurisdictions whose highest courts have not specifically stated that isolated attorney mistakes should not give rise to discipline, attorneys are not typically sanctioned under Rule 1.1 or 1.3 for simple negligence. More commonly, it appears that attorneys are disciplined for violations of Rule 1.1 or 1.3 in addition to numerous other violations of the Rules of Professional Conduct that involve intentional misconduct, dishonesty, ongoing failure to communicate with clients, or chronic neglect of clients' interests. For instance, in *In Re Adinolfi*, 934 N.Y.S.2d 94 (N.Y. App. Div. 2011), an attorney was sanctioned for violating New York Rule of Professional Conduct 1.3 where at least 26 of the attorney's 103 cases before the Second Circuit Court of Appeals had been dismissed for failure to file a brief. *Id.* at 95.

Finally, the Preamble to the Rules themselves suggest that isolated mistakes should not subject a lawyer to discipline: "Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations." Rules of Professional Conduct, Preamble, ¶ 19. Thus, those courts that have either explicitly stated that an isolated mistake is not a basis for discipline, or at least typically decline to sanction lawyers for such mistakes, appear to employ an approach more in keeping with the spirit of the Rules.

What about the reverse question: can an act or omission that constitutes attorney misconduct give rise to a malpractice action? The Preamble to the Rules of Professional Conduct provides that violation of a Rule should not in itself give rise to a cause of action. "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." However, violation of a Rule can be evidence of the breach of the standard of ordinary care. The Preamble provides that though "[the Rules] are not designed to be a basis for civil liability, ... [n]evertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Furthermore, some kinds of attorney misconduct have nothing to do with attorney malpractice. For instance, a felony conviction for operating a vehicle while intoxicated will certainly result in discipline, but would provide no basis for a malpractice claim.

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