Environment Has Turned Against Legal Malpractice Plaintiffs

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Body

I reluctantly agree with the tenor of Andrew Lavoott Bluestone's article, ″Are the Courts Punishing Legal Malpractice Plaintiffs?″ (NYLJ, April 9)

Early in my career, I took a case from a client who had discharged his lawyer. I realized before taking the case that it had probably been botched. Long story short, it had; then I brought my first legal malpractice case against the discharged lawyer. The malpractice case went on, in various incarnations, for more than 10 years. In the end, the client and I both made money, and I'm happy it landed in my office.

When, at the time, I thought about whether to concentrate in legal malpractice for plaintiffs, I considered the intellectual challenge of bringing two cases at once, analyzing the attorney's mistakes and proving they were not strategic, and reviving from the dead a previously viable cause of action. How exciting, in theory.

Over the years, I've been offered many legal malpractice cases, prosecuted about 15, and won or settled all but three. But I agree that the deck is stacked against the plaintiff, compared to other causes of action.

My second biggest malpractice case I took was complex, and 15 years after my first, I got the sense that the eyes of the law looked at me, and my client, askance. A legal malpractice of a divorce case--the phrase probably brings agony to the minds of many good judges. Initially, this case was thrown out on the pleadings, for reasons the Appellate Division later held were unfair.

But my client ultimately lost. After discovery, I got the firm sense that the legal environment had evolved over the preceding 15 years. My feeling was that the legal malpractice cause of action was now carrying the taint-within the profession, not the public-of ill repute. The lawyer's negligence was not in question, but evaluating the ″but for″ aspect caused the judges I appeared before much consternation. I felt there was a jury issue as to causation; six judges did not. One intoned from the bench, ″Your client was so evasive at his deposition!″-as if demeanor could be gleaned from a transcript, or had something to with summary judgment.

The case was ultimately decided because I did not hire an economic expert to prove that I could win my case at trial, something that is not the burden of the non-movant at summary judgment in New

York. Yun Tung Chow v. Reckitt & Colman, Inc., 17 N.Y.3d 29 (2011) (Smith, J., concurring). The defense had not hired an economic expert either; both sides had, however, hired former matrimonial judges as experts. The word ″speculative″ was thrown at my arguments repeatedly. But the attorney who ruins a case is necessarily the one responsible if there is no end result; should he not be estopped from arguing that damages are speculative? You can chalk this up to sour grapes, but I don't regret taking, or losing, the case. I tried my best, and was left me with the definite and firm impression that, despite how close the question, it was an unwelcome question.

With all due respect to the policy considerations in Dombrowski v. Bulson, 19 N.Y.3d 347 (2012) (the court held it would deter attorneys from taking criminal cases if they could be subject to potential malpractice for wrongful incarceration, id. at 349), why is the wrongfully convicted plaintiff the one that must bear the burden of this policy consideration?

Why is not the burden of the legal profession, which does not even mandate that an attorney carry malpractice insurance (or disclose a lack thereof)?

Dombrowski was the turning point for me. I don't rely on malpractice cases to keep my practice alive, but I'm certain that this precedent makes clear that attorneys in this state operate under special rules, and will never be assessed with anything that is economically punitive for doing a bad job. I have explained that to prospective clients often, and I'm getting tired of it.

The few lawyers who will bring an attorney-malpractice case are one small safety net for those injured by the legal profession. The cases are almost always paid by contingency, and if the courts send the message that it's extra difficult to make money, then attorneys will just take other cases. Holes in this small safety net will appear. Are there not policy considerations from that perspective? Does the legal system want to deter attorneys from bringing legal malpractice cases? Will this not erode what little protection exists to unsuspecting clients who give their case to the wrong attorney?

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