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Causation in Professional Liability Claims: A Sword and a Shield

I. Elements of the Initial Investigation

It is not uncommon for professional liability claims to arrive at the claims professional's desk appearing to be clear liability. This may be an attorney who missed a key deadline, limitations, answer, appeal, an accountant who claimed a deduction in the wrong year, a doctor who ordered the wrong medication. In every case, you owe it to the insurerd/client to make a thorough assessment of the possible causation issues. If no causation issues can be developed, you can proceed to resolve the claim on the best terms possible. If there are issues, they may lead to dismissal or at least mitigate settlement value.

The first thing to do is identify the conduct alleged to be wrongful. While the complaint will demonstrate this in a claim where suit is first notice, most claims begin pre-suit. Look past the obvious. The next step is to gather information and begin the analysis. Common sources of information are:

a. Medical records and/or Client File
b. Court records
c. Open records and Freedom of Information Act
d. Your client = Your first expert
e. Consult with an expert if appropriate

II. Common Law Causation Principles

Any action for negligence has four essential elements: 1) duty; 2) breach of duty; 3) causation and 4) legally cognizable damages. This applies to claims for professional negligence just as any other negligence claim.

Causation can be viewed as having two components, although some jurisdictions articulate a third public policy component. The first requires that the conduct be the "but for" cause of a result, or in other words, it must be shown that had the conduct been appropriate the result would have been different. This is the most common point of analysis in the professional liability context.

Even if the result would have been altered "but for" the alleged misconduct, it must be a proximate cause or a substantial factor. This means it must be more

than a condition which allowed the result to occur, but must have played an active causal role. For an example of how this rule can impact the causation analysis, see *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003) (a negligent referral was not a legal cause of an assault that occurred at the facility).

Generally, it must be shown that a causal connection is more likely than not. Some courts have modified this rule in certain contexts, allowing a recovery for loss of a chance. Most courts have limited this aberration to medical malpractice cases. *See e.g. Daugert v. Pappas*, 704 P.2d 600 (Wash. 1985). *But see O'Callaghan v. Weitzman*, 436 A.2d 212 (Pa. 1981).

The rules regarding causation generally are applied regardless of the theory plead, at least where the claim is by a patient or client. This includes claims brought for breach of fiduciary duty. *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283 (Utah 1996). Of course, in fraud claims reliance pays the role of causation. *Dyer v. Honea*, 557 S.E.2d 20 (Ga.App. 2001).

Where causation depends on the understanding of medical, technical, or scientific issues, courts require that expert proof be offered as to causation. Of course the expert cannot express an opinion that ignores the causation requirement.

III. Litigation Negligence

a. Case within the Case

In a variety of circumstance, a litigant may claim that his or her attorney's negligence caused the loss of a claim or a less than desirable result at trial. In order to recover in such a case, the litigant must prove that had the appropriate conduct occurred, the result would have been more favorable. In effect, the litigant must prove the legal negligence case and the underlying case as well, often referred to as the case within the case. The traditional view of this rule is that the case within the case must be proven and the jury instructed as though it were the original case. *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012). In effect, the allegedly negligent attorney steps into the shoes of the defendant he was going to sue. Cecala v. Newman, 532 F.Supp.2d 1118 (D.Ariz. 2007). In this circumstance, the jury is qualified to decide the underlying case so no expert is necessary as to the legal case, but is the underlying case would have required expert proof then expert proof is required in proving the case within the case. *Kelly & Witherspoon, LLP v. Hooper*, 401 S.W.3d 841 (Tex.Civ.App. 2013) .

b. Modified Case within the Case

A number of states, although still requiring that the case within the case be proven, accomplish this through expert testimony instead of submitting the

underlying case to the jury. Carbis Sales, Inc. v. Eisenberg, 935 A.2d 1236 (N.J.Super. 2007); *Hoover v. Larkin*, 196 S.W.3d 227 (Tex.Civ.App. 2006). Likewise, the case within the case approach may be limited to claims where the negligence allegedly prevented the suit from proceeding or resulted in a default against a defendant. *Basic Food Industries, Inc. v. Grant*, 310 N.W.2d 26 (Mich.App. 1981). Additionally, the modified approach may be more appropriate where the litigation is administrative, such as workers' compensation, *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky.2003), or immigration. *Palmer v. Sena*, 474 F.Supp.2d 347 (D.Conn. 2007). But see *Tarleton v. Arnstein & Lehr*, 719 So.2d 325 (Fla.App. 1998)(jury can determine whether divorce trial would have been better than settlement without expert).

c. Collectability

All jurisdictions that have considered the issue recognize that collectibility of the underlying judgment is relevant to a legal malpractice claim. *Paterek v. Petersen & Ibold*, 890 N.E.2d 316, 320-21 (Ohio 2008); *Kituskie v Corbman*, 714 A.2d 1027, 1030 (Pa. 1998). Any other rule would provide a claimant a windfall. *See also Klump v. Duffus*, 71 F.3d 1368, 1374 (7th Cir. 1995) ("In a malpractice action, a plaintiff's "actual injury" is measured by the amount of money she would have actually collected had her attorney not been negligent.") Evidence of collectibility "provides a realistic picture of what the malpractice claimant actually lost." *Paterek*, 890 N.E.2d at 320.

Most jurisdictions place the burden of proving collectability on the plaintiff, but a number of states have determined that it is an affirmative defense. *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 31-32 (Alaska 1998); *Clary v. Lite Machs. Corp.*, 850 N.E.2d 423, 440 (Ind.Ct.App. 2006); *Carbone*, 864 A.2d at 320 (N.H. 2004); *Lindeman v. Kreitzer*, 775 N.Y.S.2d 4, 8-9 (N.Y. App. Div. 2004); *Kituskie*, 714 A.2d at 1032 (Pa. 1998). These courts reason that the issue of collectability is raised by the defendant's negligence, and thus the burden should be on him. A couple of courts have held that the burden shifts to the defendant where the defendant's conduct made it impossible to prove collectability. *Fernandes v. Barrs*, 641 So.2d 1371, 1376 (Fla.Dist.Ct.App. 1994), *disapproved of on other grounds by Chandris, S.A. v. Yanakakis*, 668 So.2d 180 (Fla. 1995). *See also Jernigan v. Giard*, 500 N.E.2d 805, 807 (Mass. 1986).

Note that collectability is not an all or nothing proposition, and a potential judgment may be partially collectable, as in the case of insurance with insufficient limits. *Garretson v. Harold I. Miller*, 121 Cal.Rptr.2d 317, 321 (2002); *Taylor Oil Co. v. Weisensee*, 334 N.W.2d 27, 30 (S.D. 1983).

d. Appeals

An appellate malpractice can arise as a result of failing to file a timely appeal, failing to comply with a rule, or failing to raise (or perhaps preserve) an issue. Such a claimant must prove that had the error not occurred he would have prevailed, just as with trial litigation. However, it seems to be universal that the determination of whether the appeal would have been successful is a question of law. *Millhouse v. Wiesenthal*, 775 S.W.2d 626 (Tex.Civ.App. 1989).

Appellate malpractice can generate two separate causation issues. For example, of the claim is that the lawyer failed to perfect an appeal, the claimant must shoe first that "but for" the error claimant would have prevailed on appeal, and then that the appellate ruling would have led to a successful retrial. *Charles Reinhart Co. v. Winiemko*, 513 N.W.2d 773 (Mich. 1994)

IV. Transactional Negligence

Most courts apply the traditional "but for" test to claims of negligence arising from transactions as well. *Cannata v. Wiener*, 789 A.2d 936 (Vt. 2001). For example, in *Hazel v. Thomas*, 465 S.E.2d 812 (Va. 1996) the Court held that the plaintiff had to prove that the other side would have agreed to the terms claimed to be better in the malpractice action. Some courts, particularly California courts, have viewed the substantial factor test as a replacement of the "but for" test, at least in the transactional context. *Vinar v. Sweet*, 70 P.3d 1046 (Cal.App. 2003).

Where the alleged negligence is the failure to include a provision, in addition to the question of whether the other side would have agreed always confirm that the provision would have been enforceable under the facts presented. This is particularly useful in the context of non-compete provisions.

V. Real Property Claims

a. Liens and Encumbrances

A common claim against attorneys is the failure to identify a lien or encumbrance on a title. While these claims are often resolved quickly, there are situations where causation can be a complete or partial defense. It goes without saying that the claimant must have known about the title search in order to have relied upon it. *Tess v. Lawyers Title Ins. Corp*., 557 N.W.2d 696 (Neb. 1997); *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716 (Utah 1990). Always make sure the offending lien is enforceable, and has priority over the interest of the former client. For example, a lien may have been ineffectively perfected, may be subordinate to the client's interest as in the case of a purchase money security interest, may have

been satisfied but not released, or may be barred by a limitations statute. *See e.g. Albin v. Pearson*, 734 N.Y.S.2d 564 (N.Y.App. 2001). Or the claim may be limited to the cost of removing or clearing the lien. *Gram v. Davis*, 495 S.E.2d 384 (N.C.App. 1998).

b. Non-disclosure Claims

Real estate non-disclosure claims are very state and some cases city specific, and most states have various statutes supplementing the common law. Causation is not the first line of defense in these cases, but can become important where the buyer is trying to recover based on the idea that they would not have purchased the property even though the defect is relatively minor or there is a reason to believe that the buyer wants to avoid the purchase for other reasons. It is necessary to show that the buyer would have declined the purchase had the defect been disclosed. *O'Hern v. Hogard*, 841 S.W.2d 135 (Tex.Civ.App. 1992).

VI. Elder Law Claims

It is not uncommon for an elderly person to make changes to a will or transfer property late in life. On occasion, such changes can favor one child over another, or offend all of the children. The attorney can be seen as a source of funds to give all the children what they want. In these cases, however, it is very difficult to establish causation. If the elderly client in fact did not have the mental capacity to make the will or deed, then it is voidable and no damage is done, except perhaps the expense of having the document set aside.

VII. Tax Claims

Whether the professional involved in an accountant, an enrolled agent or an attorney, the general rules of causation apply to tax cases. Typically, the alleged negligence results in an underpayment of taxes, which later results in a tax assessment, interest and penalties. In such a case the tax is never compensable because the tax would have been due regardless of the professional's conduct. *O'Bryan v. Ashland*, 717 N.W.2d 632 (S.D. 2006). An overpayment can generally be corrected, but at least theoretically could result in the tax due being compensable.

The penalty caused by the underpayment generally is causally related to the alleged negligence, but make sure the claimed penalties are all related. In *Frank v. Lockwood*, 749 N.W.2d 443 (Neb. 2008), the court found a penalty for late filing was not caused by the negligence in the preparation of the return.

The interest charged by the taxing authority is a more controversial potential item of damages. The traditional rule is that interest is not recoverable, because plaintiff had the use of the money for the period of time the taxing authority

charged interest. *Eckert Cold Storage, Inc. v. Behl*, 943 F.Supp. 1230 (E.D.Cal. 1996); *Leendertsen v. Price Waterhouse*, 916 P.2d 449 (Wash.App. 1996); *Alpert v. Shea Gould Climenko*, 559 N.Y.S.2d 312 (N.Y.App. 1990); *Orsini v. Bratten*, 713 P.2d 791 (Alaska 1986). But some courts leave open the possibility of a claimant making a showing of harm as to the interest charged. In *Frank v. Lockwood*, 749 N.W.2d 443 (Neb. 2008), the court held that a claimant might shoe interest related harm by showing that money could have been borrowed at a lower rate or that the claimant had the money to pay the tax but the value of holding the money was less to him than the interest rate charged. See also *O'Bryan v. Ashland*, 717 N.W.2d 632 (S.D. 2006); *Miller v. Volk*, 825 N.E.2d 579 (Mass.App. 2005).

Until the taxing authority issues a deficiency notice or assessment, the allegedly negligent conduct has caused no harm. *Thomas v. Cleary*, 768 P.2d 1090 (Alaska 1989).

VIII. Plaintiff's Misconduct

A plaintiff's conduct may impact exposure, and is usually accounted for using comparative fault principles. Jurisdictions may refer to this concept of accounting for a plaintiff's conduct in tort cases under various terms—contributory negligence, comparative fault, and/or apportionment of fault. Typical areas where you might see some apportionment of fault to a plaintiff include where the client failed to supervise the representation, refused to follow instructions or advice, failed to provide an attorney with information, or interfered with the representation in some way. Also, after the malpractice, the plaintiff may fail to mitigate their damages from an attorney's negligence. One basic example of this last category is where a plaintiff pursues a legal malpractice claim against an attorney rather than attempting to fix any deficiencies that might be reparable in the underlying suit.

Practitioners should be aware of jurisdiction-specific requirements for applying contributory negligence or comparative fault against a plaintiff. One area of inquiry should be whether contributory negligence or comparative fault are foreclosed because of the actual causes of action asserted. Because these are negligence concepts, they may not apply for claims for breach of the attorney-client contract or breach of fiduciary duty. See *Jackson State Bank v. King*, 844 P.2d 1093, 1097 (Wyo. 1993) (holding that neither comparative negligence statute nor any other principle of Wyoming law requires the plaintiff's recovery be reduced by his percentage of fault). Even if the claim is seen as a tort, application of comparative fault may be limited where the claim is viewed as an intentional tort. Fortunately, most jurisdictions look at the underlying factual bases of the claim to determine if it is in fact negligence-based, rather than where the plaintiff prefers to steer the claim.