



ECG Advisory: Suing Attorneys in California Becomes More Difficult in 2003

During the first half of 2003, three California appellate courts made it harder for clients to sue their former attorneys. It has always been the law that to sue a litigation attorney in California an injured client must prove he would have *definitely* obtained a better result “but for” the attorney’s alleged malpractice. This is typically referred to the “case-within-a-case” proof requirement. That is to say, to establish causation and damages in a litigation malpractice case, the injured client must not only prove that his former attorney acted negligently, but that the attorney’s specific act(s) of negligence caused the client to lose or come out worse in an earlier lawsuit. As a practical matter, this usually means the injured client must hire a second attorney to “retry” the earlier lawsuit before a second jury to prove he would have won where he previously lost.

Until 2003, the law was less clear with regard to transactional malpractice. Must a client who sues an attorney for, say, negligent preparation of a contract also prove he definitely would obtained a better or more profitable deal had the contract been drafted correctly? Some courts have suggested that this would place an injured client in the impossible position of proving the unknowable – the outcome of a seemingly endless series of “what if” scenarios akin to rewriting history based on an imaginary alternative timeline of events (much like the plot of *It’s a Wonderful Life* starring Donna Reed and the late James Stewart).

Three appellate decisions this year answered this question squarely in favor of attorney defendants. Most recently, the California Supreme Court in *Viner v. Sweet*, 30 Cal. 4th 1232 (2003) overturned an intermediate appellate decision that permitted a transactional client to recover damages against his attorney without proving he *definitely* would have obtained a “better deal.” According to the intermediate court, the transactional context is ill-

sued for second guessing of what “might have” occurred in the absence of professional malpractice: *i.e.*, what contractual terms an opposing attorney might have accepted during negotiations and whether further negotiations would have resulted in a different outcome. The Supreme Court disagreed. In an unanimous opinion, the *Viner* Court held:

In a client’s action against an attorney for legal malpractice, the client must prove, among other things, that the attorney’s negligent acts or omissions caused the client to suffer some financial harm or loss. When the alleged malpractice occurred in the performance of transactional work (giving advice or preparing documents for a business transaction), must the client prove this causation element according to the “but for” test, meaning that the harm or loss would not have occurred without the attorney’s malpractice? The answer is yes.

Later in the same opinion, the *Viner* Court stated:

The Court of Appeal here held that a plaintiff suing an attorney for transactional malpractice need not show that the harm would not have occurred in the absence of the attorney’s negligence. We disagree. We see nothing distinctive about transactional malpractice that would justify a relaxation of, or departure from, the well-established requirement in negligence cases that the plaintiff establish causation by showing either: (1) but for the negligence, the harm would not have occurred, or (2) the negligence was a concurrent independent cause of the harm.

Along the same lines, on April 11, 2003, the First District Court of Appeal in *Orrick Herrington & Sutcliffe, LLP v. Superior Court*, 107 Cal. App. 4th 1052 (2003) held that the “case within a case” proof requirement applies where a matter has been settled before trial. Hence, a client accusing an attorney of bungling a settlement must prove that a better settlement or better result *definitely* would have ensued “but for” the alleged malpractice.

Finally, on June 9, 2003 in *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal. 4th 1037 (2003) the California Supreme Court held an attorney sued for negligently giving up or losing a punitive damage claim at trial may not thereafter be sued for malpractice. According to the Supreme Court, it would subvert the purpose of a punitive damage award – deterring wrongdoers from committing despicable acts – to hold a merely negligent attorney liable for “lost punitive damages.” In other words, per *Ferguson*, it would not make sense to punish a

negligent actor with the force reserved for intentional malfeasance.

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