

# 'But for' — without more — is not enough

Like any malpractice suit, an attorney malpractice claim requires the plaintiff to allege the existence of a duty, breach of that duty, proximate cause and damages. Allying proximate cause and damages in a legal malpractice case usually means a plaintiff must plead facts to satisfy what is commonly referred to as the "but for" rule.

Judging from the complaints filed in Illinois against attorneys for malpractice the "but for" rule is one of the most misunderstood legal concepts in attorney malpractice litigation. Many legal malpractice complaints completely fail to address the "but for" rule, suggesting that the plaintiff, or plaintiff's counsel, failed to give serious thought to whether this vital element of the claim can either be properly pled or proven at trial.

In all tort cases a plaintiff is required to plead proximate cause. Since Illinois is a fact-pleading jurisdiction, the common law requires a plaintiff to plead in the complaint facts to demonstrate this element of the claim. Pleading and proving proximate cause in a non-legal malpractice tort case is often a simple matter. It is usually easy to allege how an auto accident caused physical injury or pain and suffering. The issue is most often not whether physical harm was caused but rather to what extent harm was incurred. As a result, few motions to dismiss are filed attacking this element of a medical malpractice suit and still fewer published cases exist in this area.

In contrast, a plaintiff is often unable to plead the required facts to show proximate cause in a legal malpractice case. Frequent motions to dismiss for failure to properly plead proximate cause are filed in claims against lawyers, and there are many court decisions discussing this element.

## Legal malpractice

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To plead proximately caused damages in a malpractice claim against a lawyer, Illinois law requires the plaintiff to satisfy what is commonly known as the "but for" rule. Simply stated, the rule mandates that the complaint contain facts to show that the injury would not have been incurred "but for" the attorney's negligence.

Often the former client simply claims in the initial complaint that the attorney's acts or omissions proximately caused the client's damages without any regard to the "but for" test. This indicates that either the plaintiff or the plaintiff's new lawyer failed to understand the required element. Less frequently the initial malpractice complaint alleges in conclusory fashion that "but for" acts or omissions, the injury would not have been incurred without more.

The term "but for" is simply a conclusion of fact. By itself the allegation is insufficient; usually prompting a timely motion to dismiss by counsel for the lawyer-defendant for failure to comply with

the "but for" rule.

To plead "but for," a malpractice complaint must contain facts to support each element of the underlying claim that the first attorney mishandled. This is commonly referred to as pleading the "case within the case."

For example, if the first suit was a medical malpractice action, the complaint against the lawyer must essentially plead two cases: facts to show the basis of the claim against the attorney along with facts to demonstrate each element of the underlying claim against the physician or hospital. In effect, the malpractice claim against the lawyer also must contain all the allegations that would have been alleged against the underlying defendant, the medical professional, had the claim been filed.

One more thing is required. It is not sufficient for the former client to simply plead facts to show that he would have prevailed in the underlying claim; the facts pleaded also must demonstrate that the judgment in the underlying suit would have been collected. If the defendant in the earlier claim that the lawyer failed to pursue was judgment-proof, it makes no difference that the claim was not filed within the statute of limitations. The "collectibility rule" is simply a sub-element of the overall "but for" requirement.

The "but for" rule applies in all legal malpractice cases — not just when it is alleged that an underlying suit was not timely filed or mishandled. If the charge is that the attorney's negligence caused a client to sell a business on installment without retaining an adequate security interest in the assets to ensure payment, the client must not only demonstrate the attorney gave negligent advice but also must plead

and prove facts to establish the seller could have obtained the security interest as part of the transaction. Similarly, if the claim is that the attorney failed to properly prepare an estate tax return, resulting in payment of avoidable taxes, the malpractice complaint must allege facts to show how the taxes would have been less but for the negligence. Simply alleging that the negligence caused payment of avoidable taxes without more is not enough.

The "but for" rule is the court's way of applying proximate cause to the unique context of legal malpractice. Many times it is difficult to show an attorney's breach of the standard of care actually made a difference in the outcome of a previous suit. The relatively large number of case decisions affirming motions to dismiss legal malpractice claims for failure to properly plead the "but for" requirements or to show proximate cause at trial reflects this fact.

Claims against attorneys continue to increase each year. While no doubt many claims are valid and provide an avenue for redress against an attorney who fails to meet his or her duties to a client, other actions are brought where recovery is unlikely due to the "but for" rule. The frequency with which actions are filed that fail to meet this element of the claim suggests at least that the plaintiff or the plaintiff's attorney failed to give due consideration to this hurdle when deciding to file the claim. A better understanding of the "but for" rule and its requirements should reduce the filing of claims where it is apparent that this vital element of the suit cannot be properly pled or proven at trial.