



CALIFORNIA LEGAL MALPRACTICE & MALICIOUS PROSECUTION LIABILITY HANDBOOK

EIGHTH EDITION – 2021



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INTRODUCTION

It has been four years since our previous handbook was published in January 2017. Our cover for this edition shows the legendary Santa Monica Pier, with signs we would not have imagined at the outset of 2020. Our lives were disrupted dramatically last year, both personally and professionally. Hopefully we will be able to resume our normal way of life in the near future.

Similar to never knowing what will wash ashore (or being able to anticipate that a virus will turn our world upside down) lawyers cannot foresee and anticipate all of the ways in which their activities may give rise to a claim against them. Indeed, lawyers can be sued by both former clients and third parties under a veritable cornucopia of different theories, not just legal malpractice and malicious prosecution. With this handbook the reader should be better able to identify and address the numerous issues that arise in cases against attorneys.

In contrast to our last edition, the Court of Appeal in particular has published significantly fewer cases against lawyers brought by their former clients than it had in the 2014 - 2016 time frame. Nevertheless, one recent case hit the nail on the head in the introduction of the opinion, when the Court stated “Of course, on occasion, a client may not fully appreciate the excellent result achieved by her or his attorney.” This sweeping observation happens to form the backdrop to many claims against lawyers by former clients. See *Mancini & Associates v. Jason Schwetz* (2019) 39 Cal.App.5th 656, discussed at page 211 which involved a fee dispute between attorney and client. Meanwhile, cases brought by former adverse parties against lawyers continue to be published at a seemingly higher rate. In total, the text of this edition has evolved from 210 to 237 pages, a 13% increase.

This handbook identifies the substantive and procedural issues which frequently arise in cases against attorneys, but is not intended to be a loss prevention guide. However, the client selection process is an important factor as to whether a future claim will be brought. Indeed, if a client has been represented by two or more attorneys, that should be a red flag for a lawyer before becoming the latest attorney. Similarly, if a lawyer plans to sue his or her former client to collect fees, it is recommended that strong consideration be given to delaying this until after the legal malpractice statute of limitations has run.

While there are a multitude of cases and statutes cited, this handbook is not intended to be a summary of all cases and statutes in the field. Additionally, as the law is dynamic, the reader should conduct independent research. It is especially important that cases decided in 2019 and 2020 be Shepardized. Indeed, the information provided by this handbook is for informational purposes only and may not be considered as legal advice from the authors or Lewis Brisbois. Lewis Brisbois expressly disclaims any

intent to provide legal advice, or to form an attorney-client relationship with any person based on the reading of this handbook. Now, enough of the 'legal-ease', and back to the content of the handbook.

The organization of the handbook is organized to illustrate the big picture of claims against attorneys. First, claims brought by former clients are discussed. Next, claims by non-clients are addressed. Finally, miscellaneous areas involving the practice of law are covered. The handbook discusses torts beyond malpractice and malicious prosecution. To be sure, we have noticed a trend of plaintiffs' lawyers attempting to add allegations of actual fraud to attempt to get around the general one year statute of limitations period, and to add the possibility of punitive and emotional distress damages.

Turning to the law itself, in November 2018 California adopted a wholesale revision of its Rules of Professional Conduct ("RPC"). The new RPC more closely parallel the ABA Rules, but do not mirror them. A breach of the California RPC cannot constitute an independent cause of action, however often plaintiffs' lawyers will seek to use a breach of the RPC to show malpractice. The substantive and procedural rules applicable to malpractice litigation are essentially the same as those for other civil cases in California. Nonetheless, the handling of a lawyer's professional liability claim may present unique procedural and legal issues for the defendant lawyer, his or her counsel, and the lawyer's insurer. For example, in general, the statute of limitations in a malicious prosecution action is two years, but for such actions against attorneys it appears to be only one year. These unique issues often lend themselves to resolution via demurrer, summary judgment, or in the case of malicious prosecution actions and other third-party claims, via California's anti-SLAPP statute.

Speaking of the statute of limitations, California's statute of limitations as to claims against attorneys - C.C.P. section 340.6 - is generally thought of as favorable to attorneys, compared to some similar statutes in other states. However, due to Covid-19, Emergency Rule 9 was enacted, suspending all statutes of limitations from April 6 to October,1 2020 (178 days). It remains to be seen how Rule 9 will be interpreted, and what impact, if any, it will have on California's statute of limitations. (See p.37).

On a personal note, I would like to thank my partner Michael Wilk and our staff for their assistance with preparing this handbook. Most importantly, I appreciate the tremendous contribution of my partner **David Samani**. David first became involved with our 6th edition, which was published in 2014, and the huge involvement and countless hours he has devoted to the handbook continue to make it possible.

We hope you find the handbook helpful to your practice and claims handling. Happy reading.

Ken Feldman
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