

Criminal Defense Attorneys Face High Dollar Malpractice Claims

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There seemingly is a comforting misconception these days that malpractice cases against attorneys are on a decline. The misguided view is that commercial clients are generally happy with the work performed by their attorneys and that therefore this apparent goodwill will translate across the entire legal profession.

However, the hard facts are that the criminal defense attorney stands in a distinctly different position because his clients' matters are independent of the current economic circumstances. Moreover, the gains in technology regarding scientific evidence have rendered attorneys who have not employed such technology vulnerable to attack. In addition, it must be noted that the recent publicity surrounding exoneration of former death row inmates may motivate other criminal defendants to assert they too were wrongly convicted due to defense counsel's handling. A review of recent professional liability cases over the past five years provides a chilling example of the types and magnitude of legal malpractice claims criminal defense lawyers must currently battle.

Routine Matters Pose A High Risk

Even the most routine cases can result in significant plaintiff's verdicts when the attorney simply has not been able to devote the time to the case that hindsight deems appropriate.

Plea Recommendations

- One criminal defense attorney was sued for malpractice after his client decided to change her guilty plea. Plaintiff, the owner of a medical services company, and her husband, a physician, were both indicted on charges of tax and bank fraud. The couple retained separate counsel and plaintiff made several admissions to her attorney which eliminated several potential defenses. At trial, the couple's attorneys worked together. The husband's attorney presented an opening statement but plaintiff's attorney made a strategic decision to delay his opening remarks until plaintiff's direct examination. On the day plaintiff was to take the stand, the prosecution offered the couple plea bargains. The couple agreed to plead guilty to two charges. After the Court discharged the jury, several jurors stated that the evidence presented was sufficient to convict plaintiff but not her husband. Prior to sentencing, the couple retained new attorneys and advised the Court that they wished to withdraw their guilty pleas. The Court sustained their requests, a second criminal trial commenced and they both were acquitted. Nevertheless, proceedings were instituted to revoke plaintiff's business license and she filed suit against her first defense attorney. The suit alleged multiple grounds of malpractice including, among other things, that her attorney did not advise her that her business license may be revoked as a consequence of the plea agreement. Thereafter, contentious litigation ensued and, although a majority of jurors felt that defense counsel's performance fell below the standard of care, the jury declined to award plaintiff damages. The defense attorney's appeal of the verdict continues to pend, and defense costs incurred to date exceed \$400,000.

- In another recent case, a \$1.77 million judgment was entered against a defense attorney because he simply assumed his client would receive a sentence of probation in lieu of jail time. Plaintiff, a 77 year old great-grandmother, was charged with endangering the welfare of a child for having known that there was a prior allegation against her son for sexually assaulting her great-grandson and allowing it to happen a second time. Plaintiff's defense counsel did not investigate the underlying charge, interview witnesses, obtain crucial documents or discuss with plaintiff the prosecution's burden of proof and her possible defenses. Instead, defense counsel recommended that plaintiff plead guilty because he thought it was highly unlikely a judge would sentence her to jail time and she would probably receive probation. Plaintiff followed his advice and was sentenced to three years in prison. Plaintiff retained new counsel, who investigated the case and discovered that the endangerment charge had no basis because, when plaintiff took her great-grandson to the hospital after the first alleged assault, no evidence of abuse was found and the child recanted the story. The conviction was overturned, but not until after plaintiff had served one year in prison. Plaintiff sued her first defense attorney for malpractice and a jury awarded \$1.77 million in damages. The attorney did not have professional liability insurance.

Insufficient Case Investigation

- A high-cost malpractice claim arose when a defense attorney waited too long to investigate his incarcerated client's claim of mistaken identity. The underlying criminal case began when authorities determined that an individual with the same name as the plaintiff had been involved in drug trafficking activity. Plaintiff was incarcerated notwithstanding the fact he had informed officials that he was misidentified and was innocent. His appointed defense attorney was not able to appear at the arraignment and at two subsequent hearings, and, during the thirty day period following his appointment, the attorney was not able to communicate with the plaintiff at all. Nearly two months after the arrest, the attorney met with plaintiff who informed him that he was not the individual sought by the police. The attorney did nothing, except determine the case would require more hours than his contract allowed and therefore requested that the case be reassigned. The new attorney investigated plaintiff's contentions of innocence and arranged for his release within a month. By that time, the plaintiff had been incarcerated for four months. Plaintiff filed a malpractice suit and alleged that the first attorney had been negligent by failing to promptly communicate with him and commence a defense. Discovery ensued and the attorney was deposed. During the deposition, the plaintiff's counsel succeeded in eliciting potentially damaging testimony. On the witness stand at trial, the defense attorney attempted but failed to rehabilitate his deposition testimony and thereby angered the jury. The attorney ultimately settled the case for \$450,000 after incurring \$76,000 in defense costs.

- In another matter involving mistaken identity, the plaintiff was incarcerated for nine weeks before his attorney investigated his contention that he was not the individual the police had targeted. Because the attorney failed to initially confirm the plaintiff's identity, the defendant settled the malpractice action for \$55,000 after incurring \$14,000 in defense costs.

DNA Testing

- A defense attorney recently was held liable for a \$2.6 million verdict because he did not pursue conclusive DNA testing before going to trial. The underlying criminal case arose when police arrested plaintiff on a traffic violation and mistook him for a rape suspect depicted in a composite drawing posted at the police station. Plaintiff was then identified by the rape victim in a line-up and

charged with sexual assault. Defense counsel was to present an alibi witness at trial who talked to plaintiff at his home by telephone on the morning of the assault; however, the witness could not be located on the eve of trial and defense counsel did not request a continuance. Instead, defense counsel planned to focus on refuting the prosecution's DNA evidence, a hair found at the scene consistent with plaintiff's hair but not conclusive. Defense counsel previously had been advised that it might be possible to conduct more conclusive testing at a distant laboratory but did not pursue this testing. Plaintiff was convicted and sentenced to 19 years in prison. DNA testing eventually ruled out plaintiff as a suspect and the conviction was overturned four years later. A jury found the defense attorney liable for malpractice and awarded \$2.6 million in damages. The defense attorney did not carry professional liability insurance.

- In another case involving a plaintiff convicted of sexual assault, a defense attorney was found liable for failing to pursue DNA testing notwithstanding the fact that DNA tests were not available or accepted at the time of plaintiff's criminal trial. Plaintiff was convicted and had served over six years in prison before DNA tests exonerated him of the charges. The plaintiff contracted the AIDS virus allegedly as a result of a sexual assault in prison; in addition, the plaintiff's mother, to whom he was extremely devoted, died while he was incarcerated. The plaintiff sued his defense counsel for malpractice even though the DNA testing was not possible at the time of plaintiff's criminal proceeding. Discovery tended to indicate that the plaintiff's case probably had strong jury appeal. Additionally, the case received significant media attention because of the sensational circumstances which likely enhanced the public sympathy for the plaintiff. Fearing an adverse Judgment and a significant damage award, the attorney settled for \$50,000 after incurring \$162,000 in defense costs.

Discovery

- In a recent case, a defense attorney who carefully investigated the facts of his client's complex white-collar criminal case opened the door to malpractice liability and extremely high defense costs simply because he relied on the government's efforts to obtain all relevant documents from a third party. The defense attorney represented an individual who had been indicted by a Federal Grand Jury on 60 counts of mail fraud and money laundering. The attorney masterfully obtained an acquittal of the defendant on 58 counts. However, the defendant was convicted on the remaining two counts of mail fraud and was incarcerated for slightly more than two years.

The individual later alleged that he was wrongfully convicted because the evidence presented at trial did not include an essential element for proof of mail fraud—the use of the U.S. mails. The Federal Statutes in effect at the time of the government's prosecution only criminalized the use of the U.S. Postal Services for alleged mail fraud but not the use of private carriers such as UPS. During pre-trial investigation, the government had obtained the cooperation of a third party who voluntarily turned over documents to the government. The defense attorney had received copies of all documents and found that none showed the use of any means other than the U.S. mails. The defense attorney did not utilize a formal subpoena to obtain the third party's documents. In connection with post-conviction proceedings, the former client issued a formal subpoena to the third-party who produced documents in addition to those it voluntarily turned over to the government prior to the criminal trial. The documents indicated that a private carrier rather than the U.S. mails had been used in the underlying offense. The former client won a habeas corpus ruling based on absence of proof of an essential element of a crime and ineffective assistance of counsel. Armed with this dangerous ruling, the former client filed a malpractice lawsuit against his defense attorney which alleged failure to investigate.

The malpractice lawsuit focused on the attorney's investigation of the method of transmission of the documents and the attorney's alleged failure to issue a subpoena to the third party. Despite the attorney's detailed investigation of this complex white collar criminal matter, his misplaced reliance on the government's investigative efforts resulted in a \$330,000 settlement payment and \$170,000 in defense costs.

Admission of Evidence At Trial

- In a recent case, a defense attorney was found liable for \$641,858 in damages because he permitted "prejudicial and confusing" evidence to be admitted at trial. In the underlying case, plaintiff was charged with felonious assault in connection with a beating which allegedly occurred at the victim's apartment at approximately 7 a.m. Plaintiff admitted he had been involved in a physical altercation with the victim earlier that morning at 1 a.m. when he helped a woman retrieve her keys from the victim, who was her ex-boyfriend. The police were called but no criminal charges resulted. Plaintiff adamantly denied involvement with the 7 a.m. beating. The defense attorney did not call alibi witnesses at trial which would have proved plaintiff had been working at 7 a.m. and permitted evidence to be admitted in respect of the 1 a.m. altercation. The jury was confused by this evidence and ultimately convicted plaintiff for his involvement with the 1 a.m. incident. After serving his entire four year sentence, plaintiff sued his defense attorney for malpractice and the jury awarded \$641,858 in damages for pain and suffering. The defense attorney did not have professional liability insurance.

Statutory Research

- Another malpractice case involved a botched sentence for two counts of drug trafficking. The prosecutor sought and obtained an enhanced sentence against the plaintiff criminal based on a statute which allowed a longer sentence in cases where the criminal has a demonstrated history of violent offenses. The plaintiff here had previously been convicted of negligent assault. His attorney did not research the statute and did not recognize that, under applicable law, negligent assault was not considered a violent crime upon which an enhanced sentence could be based. As a result, plaintiff was incarcerated to 34 months longer than necessary. Plaintiff sued his attorney for malpractice and the attorney eventually settled for \$70,000 after incurring \$15,000 in defense costs.

- In yet another action involving attorney neglect, an individual was convicted of aggravated arson pursuant to an invalidated criminal statute. The attorney appointed to handle the appeal did not perform any work on behalf of his client and the appeal was dismissed for want of prosecution. The plaintiff then was sent to jail to serve his sentence. Two years and nine months later, an assistant public defender discovered that the statute pursuant to which the plaintiff had been convicted had been invalidated six months before plaintiff's trial. The public defender moved to vacate the conviction, the State confessed error and the plaintiff was released from prison. The plaintiff then sued the appointed appellate counsel, won a Summary Judgment and trial was conducted on the damages issue. The plaintiff was awarded \$244,332.

Case File Neglect

- A malpractice matter arose out of an attorney's representation of the plaintiff in connection with charges of trafficking in stolen property and drug possession as well as a civil forfeiture proceeding. The attorney initially was active in representing the plaintiff with respect to the civil forfeiture proceeding, but after a year, the attorney failed to appear at hearings and failed to file any papers. Summary Judgment was entered against the plaintiff who then sued the attorney for abandonment. The case was eventually settled for \$55,000 but not before defense costs of \$51,000 were incurred.

Scope of Legal Representation

- A defense attorney's agreement to defend a very litigious individual in respect of burglary and theft charges led to a lawsuit costing \$100,000 to defend. The State initiated a property forfeiture proceeding with respect to the client's automobile in connection with the criminal charges. Defense counsel sought to preserve the auto as material evidence in the criminal case and obtained a Court Order to protect the auto from being auctioned, disposed of or otherwise altered. The client ultimately pleaded guilty and received a three year prison sentence and the client's auto was auctioned off by the State.

The client complained repeatedly to his defense attorney that he did not adequately investigate the case, raise all applicable defenses and file a timely appeal on his behalf. The client also complained that his sentence was excessive, his auto had been wrongfully sold and the defense attorney had conspired with the prosecution. The defense attorney advised the client that the scope of his legal representation had not included the forfeiture proceeding. The defense attorney also sought to modify his client's sentencing order, but the Court determined that the sentence was proper.

The client then brought suit against the attorney for malpractice and alleged multiple theories of liability. The case was dismissed. The client then filed a second lawsuit which alleged that defense counsel had made false statements in respect of the first malpractice lawsuit. The second lawsuit was dismissed and plaintiff appealed. The Appellate Court denied the Appeal as to the malpractice claims but remanded the case to the Trial Court in respect of the defense attorney's alleged failure to preserve the client's auto from forfeiture. The case proceeded to trial on a negligence claim for failure to preserve the auto. The Court dismissed the case on the second day of trial because the client did not present expert witness testimony as to the proper standard of care. The client proceeded to file a series of post-judgment motions and another Appeal. The Appellate Court affirmed the Trial Court's decision and the client eventually agreed to waive his right to seek any further relief in exchange for the release from costs awarded by the Trial Court. At the end of the day, the attorney's defense fees exceeded \$100,000.

- In another matter, a simple administrative decision based on sound financial reasons led to an expensive settlement based on the threat of a malpractice lawsuit. In this instance, an individual was indicted on several counts of insurance fraud with respect to allegations that the defendant's repair business had used salvaged auto parts when it had charged for new parts. The defendant retained the services of a well-known criminal defense firm whose principal partner is a nationally-renowned defense attorney. The principal partner agreed to personally try the case. Several years after the initial indictment and after thousands of hours of defense work, the firm notified the defendant that the principal partner would not personally try the case. The case would be tried by other attorneys who had handled the day-to-day defense. The defendant objected on the basis that the retention agreement specified that the principal partner would try the case. The defense firm offered to refund the defendant's fee. The defendant refused the offer, retained new counsel and opposed all efforts

by his first defense counsel to withdraw from the case. Although the defendant eventually agreed to accept \$100,000 to allow his first defense firm to withdraw, the agreement preserved defendant's purported malpractice claims.

Claims Against Criminal Defenders Involving Non-Criminal Matters

As the foregoing establishes, even in cases involving their area of specialty, criminal defense attorneys often make expensive mistakes. However, many attorneys who specialize in criminal defense also accept other types of cases. Because of the attorney's potential lack of familiarity with these other areas of the law, these non-criminal cases tend to generate significant malpractice claims.

Personal Injury

- In a recent case, missing a Statute of Limitations resulted in an expensive settlement. A criminal defense attorney failed to file a personal injury suit before the expiration of the Statute of Limitations because of a computer glitch. The 22 year old female plaintiff sustained a significant internal injury to her lower left leg while working out and retained an orthopedic surgeon to repair the bone and ligament damage to the leg. During surgery, a cauterizing procedure was required. This procedure did not conform with appropriate and customary medical standards and, consequently, plaintiff was left with a large, unsightly and permanent scar in a visible area of the lower left calf. Plaintiff's father retained his long-time friend, a criminal defense attorney, to pursue a medical malpractice claim against the surgeon on his daughter's behalf. The attorney notified the surgeon in writing of his intent to sue and entered the appropriate last date for suit into his computer docketing system. However, the computer docketing system failed and suit was not filed within the time permitted by the Statute of Limitations. Plaintiff retained new counsel and obtained a \$75,000 settlement from her father's friend for legal malpractice.
- In another matter, a simple procedural oversight led to a settlement to avoid potential malpractice liability. A criminal defense attorney who agreed to represent a plaintiff in a bodily injury lawsuit was accused of not properly representing plaintiff's interests which resulted in the dismissal of her lawsuit. The defense attorney accepted the case and subsequently left his law firm to start his own firm. The attorney retained the case but neglected to file a notice of substitution of counsel. His former firm also neglected to file a notice of withdrawal. Therefore, all notices from the Court were sent to the attorney's former firm which did not forward the notices to the attorney. After a period, the Court placed the matter on the inactive calendar and sent a notice which stated that it would dismiss all claims by a certain date unless further action was taken by plaintiff. The defense attorney never received this notice. Plaintiff's case was dismissed for lack of prosecution and this dismissal was upheld at the appellate level. After plaintiff threatened a malpractice claim, this matter was settled for \$24,000.
- In a similar vein, a defense attorney's failure to document a conversation with his client resulted in a malpractice claim. Here, the attorney agreed to represent a plaintiff in a medical malpractice action. The attorney missed the statutory filing date and the plaintiff's personal injury action was time-barred. In his defense, the attorney claimed that he retained an expert to review the plaintiff's medical file and the expert determined that plaintiff's medical condition was considered "pre-existing" and thus the plaintiff would not prevail on her case. The attorney claimed that he verbally communicated this conclusion to the plaintiff, who promptly removed her case file and told him to just 'forget it.' The attorney did not memorialize his advice in writing. The plaintiff ultimately sued

for malpractice and alleged that she was denied her right to pursue general damages in the amount of \$500,000.

Divorce

- In one recent divorce case, the attorney followed her client's instructions to the letter but was nevertheless sued for malpractice. The plaintiff retained the attorney for a fast, simple divorce. The plaintiff's husband was willing to enter into a prompt stipulation of divorce and the client thought her husband would agree to an equitable financial settlement. Nonetheless, the attorney advised that they should investigate the husband's financial status before drafting the settlement agreement. It appears that the husband owned a small company that historically had not produced much profit; therefore, the client pressured the attorney to proceed to effectuate the divorce without conducting discovery. As a result, the client signed a stipulated divorce agreement which did not require the husband to provide her with any shares of his company and which relieved the husband of any obligation to support the wife in the future. Shortly after the divorce, the ex-husband's business became extremely profitable.

The client eventually discovered that her ex-husband's interest in his company was valued at about \$10 million and she sued her ex-husband for misrepresentation. The case was dismissed because of the wife's agreement to the stipulation of divorce; naturally, the wife sued her attorney for negligence. The attorney insisted she had not been negligent and was merely following the plaintiff's instructions to obtain a quick divorce with no discovery. However, the attorney had no documentation to establish that she had counseled her client to conduct discovery and that her client had rejected the advice. Because of the factual issues that would have required submission to a jury, the case was settled for \$75,000. Defense costs of \$21,000 were incurred.

- In another divorce action, a criminal attorney represented a wife in divorce proceedings against her husband who was formerly in the military. Because of the attorney's unfamiliarity with spousal interests in pensions, he drafted a marital property settlement that gave the wife a share of the spouse's pension based on the length of the marriage rather than for the length of the husband's life. The wife sued the attorney for malpractice and alleged that the attorney's negligence caused her to lose substantial pension benefits. The case proceeded through discovery and eventually settled for \$45,000.

Failure to Comply with Statutory Notice Requirements

- A recent case arose out of an attorney's representation of the plaintiff in a personal injury case against a publicly owned hospital. The attorney attempted to resolve the claim informally with the hospital and conveyed a settlement demand of \$300,000. However, the attorney failed to comply with a statute pertaining to claims against public entities and the personal injury claim was ultimately dismissed. The client sued the attorney and eventually won Summary Judgment on the liability issue. Before the commencement of trial on the damages phase, the attorney settled for \$115,000 after incurring \$26,000 in defense costs.

- In a similar case, a plaintiff alleged that the attorney failed to file a timely notice of claim with the municipality. The plaintiff was eventually allowed to go forward with the personal injury action; nonetheless, the attorney incurred over \$20,000 in fees in defending the malpractice claim.

Defamation

- A former county prosecutor sued the Board of County Commissioners alleging that the Board had defamed him and had conspired to interfere with his ability to perform his duties. The prosecutor alleged that this conspiracy arose in opposition to his efforts to expose inefficiency and corruption within the county. In his Complaint, the prosecutor included a county public defender, who had consulted with the county board with respect to its ongoing public controversies with the prosecutor, as a defendant. The prosecutor claimed that the public defender had defamed him, but the public defender claimed he had merely exercised his right to comment on the public activities of a public official. After a year of litigation the matter has not been resolved and defense costs have already exceeded \$60,000.

Property

- A recent legal malpractice case arose when an attorney filed suit on behalf of clients without investigating the legitimacy of his clients' complaints. The underlying matter arose when the plaintiff couple hired a company to recarpet their home. The company allegedly damaged their house, alarm system and telephone line during the carpet installation. The plaintiffs hired an attorney specializing in criminal defense to prosecute their property damage claim against the carpet company. The attorney, however, did not conduct a rudimentary investigation of the couple's claim prior to filing suit against the carpet company. If the attorney had conducted any investigation, he would have learned that the company had previously volunteered to provide the couple with the same relief sought in the suit. The Court not only dismissed the plaintiffs' case, but also granted the carpet company's motion for attorneys' fees and entered a judgment against plaintiffs for \$33,000. The attorney ended up settling the attorneys' fee award entered against his clients for \$20,000.

Personnel and Administrative Issues

Not only are criminal defense attorneys vulnerable to suits stemming from the substantive areas of their practice, they are also vulnerable to suits involving routine business practices such as billing and personnel matters.

- In one recent case, the attorney was retained to represent a criminal defendant who had posted a \$10,000 bond with the Court to secure her release from jail. After a successful resolution of the criminal proceedings, the Court sent the attorney a \$10,000 check made payable to the defendant. The attorney signed the defendant's name and deposited the check into a client trust account. She then forwarded the defendant \$4,500 and retained \$5,500 for the legal fees incurred. The plaintiff filed suit and alleged conversion and misappropriation of funds. Eventually the case settled for \$42,500 after incurred defense costs of \$24,000.

- In another recent case, a defendant fired an attorney who had worked for him for about one year. When leaving the firm, the discharged attorney removed a computer diskette that contained proprietary information such as the names and addresses of clients. The former employee then sent solicitation letters to many of the clients. In response, the defendant sent letters to the clients stating that her former employee was inexperienced and had been terminated and had removed confidential information without authorization. The letter advised the clients to disregard any communications from the discharged attorney. The former employee filed suit and alleged defamation and tortious interference with business relations. The defendant's Motion for Summary Judgment predicated

upon the truth of the statements in the letters was denied. Discovery dragged on and defense costs mounted. The defendant eventually settled for \$28,000 but defense costs were over \$54,000.

Areas of High Exposure

The most expensive claims typically revolve around emotionally charged circumstances. For example:

- A volatile malpractice matter recently arose when a defense attorney failed to revise an Order of Protection to include every condition of the Court's ruling. The malpractice suit was brought by a male plaintiff enrolled in a city university on a foreign student visa. Several disputes took place between the plaintiff and another female student who resided in the same university dormitory. She complained to university authorities that plaintiff had made menacing gestures toward her and once entered her room holding a hunting knife and threatened her. Plaintiff was arrested and defense counsel was appointed to represent him. The Court entered an Order of Protection which prohibited plaintiff from making further contact with the female student and required plaintiff to vacate the dormitory. However, the Judge orally agreed during proceedings to permit plaintiff to remain enrolled at the university as long as he 'walked away' from the female student should they cross paths. The defense attorney did not seek to revise the Order of Protection to reflect this oral modification. Thereafter, plaintiff entered the victim's on-campus workplace, glared at her, grunted and then blocked her attempt to leave. Plaintiff was charged with violation of the Order of Protection, but the jury was never informed of the oral modification and the jury instructions indicated that plaintiff could be convicted for being on campus. The defense attorney did not object and, as a result, plaintiff was convicted and was imprisoned for about three months and INS subsequently detained plaintiff for four months for violation of his visa. The Appellate Court eventually vacated the conviction because of jury instruction error. Plaintiff then filed suit against his attorney for malpractice based on his the failure to raise the oral modification of the Order of Protection. The case is still pending and plaintiff is seeking \$20 million in damages.
- In another recent case, a criminal defense attorney representing a highly controversial minor defendant used an inappropriate word during a televised interview in reference to one of the prosecution's expert witnesses. The expert filed suit against the defense attorney for slander per se since the comment was false, exposed the expert to public ridicule due to its vulgarity and directly injured her credibility and professional reputation. The case ultimately settled for over \$90,000.
- Another case arose out of the abduction and rape of an 8 year old girl. The police investigation immediately focused on the girl's father who was charged with the sexual assault. Neglect charges were then brought against the mother and father regarding both the victim and her younger brother. The attorneys representing the parents in Juvenile Court made various judgment calls with respect to handling which ultimately were deemed to doom their clients' case. First, they did not challenge the results of initial tests performed on the girl's clothing, which indicated that no bodily fluids or other evidence existed on the clothing. Next, they did not conduct a full-scale investigation of the facts surrounding the abduction for fear it might lead to additional charges against the wife. Finally, the attorneys decided not to call the daughter as a witness at the hearing on the neglect charges because of uncertainty as to her testimony.

The Juvenile Court found that either the husband or wife or someone they knew had molested the daughter. Proceedings for the victim's permanent adoption then commenced and she was removed

from her parents' custody and placed in foster care for over two years. The mother suffered severe emotional distress and attempted suicide on one occasion and was confined to a mental institution for three months during the child's absence. Eventually, police reports revealed that another man had been arrested for similar attacks. A second genetic test performed on the girl's clothing disclosed evidence to the effect this other individual was within the 5 % of the population that could have committed the crime. As a result, the charges against the father were dropped, the neglect case was dismissed and the girl was reunited with her parents.

The family then sued all of the lawyers who had represented them including the defense attorney who represented the parents in the neglect proceedings and the attorneys who represented the minor children. The parents alleged the attorneys failed to investigate the facts that ultimately exonerated the father and failed to provide the mother with proper assistance as to whether to contest the charges of neglect against her.

Under normal circumstances, the attorneys' judgment calls probably would have been considered defensible. However, the sensitive and emotionally charged facts forced the conclusion that the defendant attorneys would likely be held liable for the family's emotional distress because the jury could not be counted upon to objectively apply the normal standard of care to the attorneys' conduct. All of these factors led to the ultimate high-dollar settlement of the case - three of the defendants settled for about \$200,000 each and a fourth paid over \$110,000. In addition, each of the defendants incurred significant legal fees; the four defendants, plus a fifth who was eventually dismissed, paid in excess of \$537,000 in defense costs.

- In another significant case, the attorney was appointed to represent two minor children who had been removed from their parents' custody because of purported abuse. The attorney did not object to the recommendation to return the children to their parents because he did not believe sufficient grounds existed. The children thus were returned to their parents and, a short time later, the father beat one child to death. Both parents were convicted of second-degree murder. The surviving child was adopted and the adoptive mother was appointed special administrator for the estate of the deceased child. The adoptive mother sued the attorney who represented the children for wrongful death and for the surviving child's physical and emotional abuse. The Court denied the defendant attorney's Motion for Summary Judgment and the case was scheduled for trial. In an effort to avoid a result similar to the earlier case referenced here, the defendant attorney settled for \$57,500. Defense costs exceeded \$90,000.

Conclusion

As these cases demonstrate, notwithstanding the rise or fall in the overall number of legal malpractice actions filed, criminal defense attorneys are exposed to situations with the potential to spark dangerous malpractice claims. Seemingly routine matters can be a minefield of danger for busy defense attorneys, and non-criminal matters continue to represent an area of high and varied exposure. Although verdicts and settlements can be large, defense costs often exceed loss payments. The magnitude of these problems may not be widely known because many cases involve confidential settlements entered into prior to trial. Criminal defense attorneys consistently face high risks and high costs and can no longer afford to practice without professional liability protection.

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