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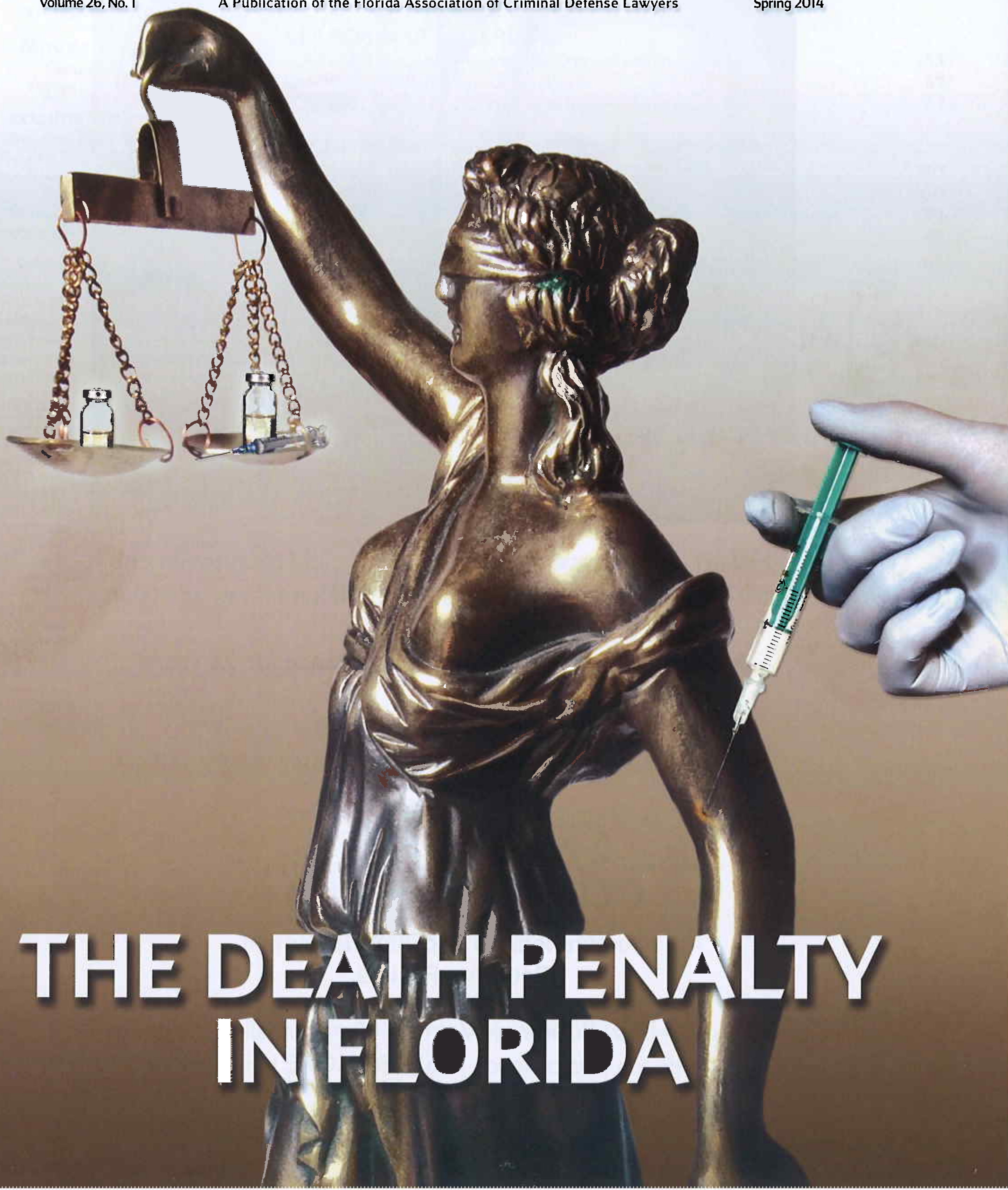

THE DEATH PENALTY IN FLORIDA

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WHEN THE CRIMINAL DEFENSE ATTORNEY IS ON THE DEFENSE:

Understanding Legal Malpractice Lawsuits

by
Rocco J. Carbone III

The best criminal defense attorneys are zealous advocates who fight day in and day out for their clients. Often, their intentions and actions in representing clients are unquestionable. However, attorneys must always be cautious of two potentialities — the ever-possible ineffective assistance of counsel claim and, the less frequent but potentially more professionally damaging, legal malpractice lawsuit. This article deals only with legal malpractice actions.

Recently, at least in Florida, we have seen an increase in these lawsuits, both by represented parties, and by *pro se* plaintiffs. As this article will illustrate, the burden for proving a legal malpractice lawsuit against a criminal defense attorney is a high hurdle. However, that does not stop a plaintiff from bringing these actions. Defense attorneys must have a basic understanding of how these lawsuits work to better protect themselves in their daily practice.

ELEMENTS OF LEGAL MALPRACTICE CASE

Generally, in a legal malpractice action, a plaintiff must plead and prove three elements: 1) employment of the lawyer; 2) the lawyer's neglect of a reasonable duty; and 3) loss to the client proximately caused by the lawyer's negligence.[1] In legal malpractice actions against a criminal defense attorney, a plaintiff's burden is heightened with the requirement to establish two additional elements; namely, 4) the plaintiff's exhaustion of appellate, or postconviction relief; and 5) "actual innocence of the crimes charged."[2] Each of these elements is explained more fully below.

EMPLOYMENT OF THE LAWYER

The plaintiff's first task is to prove that the plaintiff employed the lawyer for the particular representation at issue.[3] These actions require privity of contract between the plaintiff and the attorney.[4] A plaintiff can often establish this relationship through a retainer agreement, or correspondence between the plaintiff and the attorney. Thus, it is important for the attorney to clearly define the scope of the representation at issue. For those attorneys whose practice expands beyond criminal to include other areas, perhaps family law for example, an attorney must also be aware that other individuals besides the client may bring these lawsuits if the individual was a potential third-party beneficiary to the employment agreement with the attorney.

Where a party will clearly benefit as a third party to the attorney client relationship of another, this third party beneficiary may also bring a claim for legal malpractice.[5] In these situations, the question in evaluating whether a third party has standing turns on whether "it was the apparent intent of the client to benefit the third party."[6] This third party beneficiary exception typically occurs in family law cases, such as an adoption,[7] or when drafting a will with an intended beneficiary.[8] As such, the scope of the representation and the actions taken by the attorney within the scope of that representation is the issue when determining whether a third party has standing to bring a lawsuit.

Proof of the lawyer's employment is generally a factual determination, and an attorney cannot always easily dispose of these cases on this issue in a motion for summary judgment.[9] However, it may be a legal determination where the record is devoid of any evidence of representation by the attorney.[10]

LAWYER'S NEGLECT OF A REASONABLE DUTY

The lawyer's neglect of a reasonable duty stems from the fact that "[a] lawyer owes to the client a duty to exercise the degree of reasonable knowledge and skill which lawyers of ordinary ability and skill possess and exercise."[11] To establish this element, the plaintiff must prove the lawyer's conduct fell below the requisite standard of care.[12] Essentially, the issue turns on whether the attorney neglected to perform the services that he or she explicitly, or impliedly, agreed to when accepting employment.[13] Fulfillment of one's duty does not require an attorney to accurately predict unsettled areas of the law, or to inform the client of conflicting law, unless the conflicting law will soon be answered by controlling authority.[14]

CLIENT LOSS DUE TO LAWYER'S NEGLIGENCE

This is where the standard for a criminal defense attorney becomes

markedly different from other types of attorneys. Generally, for all attorneys, the plaintiff must prove that the lawyer's negligence was the proximate cause of the client's damages.[15] The plaintiff must be able to show that "but for" the attorney's negligent representation, the damage to the plaintiff would not have occurred.[16] The plaintiff is required to show that the attorney's actions, or inaction, resulted in an adverse outcome in the underlying lawsuit that also resulted in damages.[17] The plaintiff has the burden of proof in an action to introduce evidence proving it is more likely than not that the defendant's conduct was a substantial factor in bringing about the alleged damages.[18] This is often referred to as the "trial within a trial" standard, and requires the plaintiff to successfully prove that it would have prevailed in the underlying action before it can prevail in the malpractice case.[19]

"The mistakes you keep referring to as little 'OOPSIES,' 'BLOOPERS' and 'NO-NOS' we call malpractice..."

Focusing on criminal defense attorneys, the Supreme Court of Florida has created two additional elements for the plaintiff to establish their case due to a public policy concern.[20] In *Cira v. Dillinger*, the Second District Court discussed these additional elements at length. First, "a convicted criminal defendant must obtain appellate or postconviction relief as a precondition to maintaining a legal malpractice action."[21] The precondition is often referred to as the "exoneration rule."[22] Second, the plaintiff "must prove his or her actual innocence of the crimes charged in the underlying criminal proceeding by a preponderance of the evidence."[23] As such, the plaintiff must prove "that he was in fact innocent, and not just lucky."[24]

The Florida Supreme Court has held that a criminal defendant must be able to establish his or her innocence because "the law views the criminal conduct as the legal cause of damages, and not the attorney's malpractice. A person who is guilty need not be compensated for what happened to him because of his former attorney's negligence. There is no reason to compensate such a person, rewarding him indirectly for his crime."[25] As such, a plaintiff must be able to establish these two preconditions to successfully proceed in these lawsuits.[26]

STATUTE OF LIMITATIONS

A plaintiff has two years to file "[a]n action for professional malpractice, other than medical malpractice, whether founded on contract or tort[.]"[27] Generally, the statute begins to run "from the time the cause of action is discovered or should have been discovered with the exercise of due diligence."[28] The difficult question in many cases is when the two-year limitation period begins to run. However, for criminal defense attorneys, the Florida Supreme Court resolved this issue by creating a bright line test.[29] "[T]he statute of limitations period on the malpractice action does not commence until the defendant has obtained final appellate or postconviction relief."[30] As such, if a criminal defendant is tried, and convicted, but subsequently exonerated ten years later, then the statute does not foreclose a legal malpractice lawsuit until two years after the final appellate relief was finalized.

An additional consideration is the fact this relationship is one based on privity of contract. A criminal defense attorney must be weary of a reality that even if the statute of limitations has run, and a plaintiff files suit for legal malpractice outside the statute, many plaintiff attorneys file counts for breach of contract along with their suit for legal malpractice. A breach of contract lawsuit carries a five-year statute of limitations, rather than only a two-year statute.[31]

WHAT ARE THE DAMAGES?

A realistic question is how does one calculate the alleged damages, and what damages are available? Unlike a contracts case, or personal injury case, where there is at least some basis to formulate a number, in a criminal case one is presented with the issue of evaluating the value of a person's loss of liberty. This Florida Supreme Court discussed the issue at length in *Rowell v. Holt*.[32]

In *Rowell*, the Florida Supreme Court was deciding whether the impact rule precludes a criminal defendant from recovering noneconomic damages.[33]

The impact rule requires that "before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries sustained in an impact."[34] This rule is typically a limitation on damages to ensure a "tangible validity of claims for emotional or psychological harm" because "emotional harm may not readily align with traditional tort law damage principles" and "the existence of emotional harm is difficult to prove, resultant damages are not easily quantified, and the precise cause of such injury can be elusive."[35]

In this case, the Court held the impact rule *does not* prohibit the recovery of noneconomic damages when the negligence of a criminal defense attorney results in a loss of liberty, and resulting emotional or psychological harm.[36] Of note is the fact that the Court rephrased the certified question for the specific factual scenario of the case.[37]

In this case, the plaintiff sold two firearms to a pawnshop. The police arrested the plaintiff, and the State Attorney's Office later charged him with possession of a firearm by a convicted felon. However, the plaintiff was innocent of these charges. While he was a convicted felon, he had his civil rights restored twenty years before his arrest. During his incarceration for ten days, the plaintiff informed and handed several of his assigned public defenders a document indicating he had his civil rights restored. He was able to successfully receive economic damages when he established at trial that his attorneys were negligent when they failed to have the charges dismissed against him immediately.[38]

The Court ultimately held that a plaintiff may recover noneconomic damages due to psychological injury from a wrongful incarceration.[39] The court reasoned, "[w]here an attorney bearing a special professional duty to protect the rights of his client is provided the means to unquestionably break down the walls of wrongful, unjust pretrial restraint, but negligently fails to do so by not even delivering the clear and uncontroverted evidence, the impact rule should not bar recovery for the emotional distress that would foreseeably result."[40]

While in some cases, one may try to justifiably argue that because the holding of the case is narrowed to the certified question at issue, noneconomic damages are thus not always permitted in every criminal defense legal malpractice action. However, this case undoubtedly stands for the proposition that, at least in this context, the impact rule is not a clear bar to these types of damages.

In conclusion, while the standards remain high for a plaintiff to establish that a criminal defense attorney is liable for legal malpractice that does not preclude these lawsuits from occurring. Attorneys focused on criminal defense matters would do well to familiarize themselves with case law in the area and engage in proactive risk management measures to reduce the risks of finding themselves put on the defense.

[1] See *Law Office of David J. Stern, P.A. v. Sec. Nat'l Servicing Corp.*, 969 So. 2d 962, 966 (Fla. 2007).

[2] *Cira v. Dillinger*, 903 So. 2d 367, 370-371 (Fla. 2nd DCA 2005).

[3] *Gutter v. Wunker*, 631 So. 2d 1117 (Fla. 4th DCA 1994).

[4] *Angel, Cohen and Rogovin v. Oberon Inv., N.V.*, 512 So. 2d 192, 194 (1987) ("Florida court have uniformly limited attorneys' liability for negligence in the performance of their professional duties to clients with whom they state privity of contract.").

[5] *Angel*, 512 So. 2d at 194.

[6] *Greenberg v. Mahoney, Adams & Criser, P.A.*, 614 so. 2d 604, 605 (Fla. 1st DCA 1993).

[7] *Rushing v. Bosse*, 652 So. 2d 869 (Fla. 4th DCA 1995).

[8] See *Espinosa v. Sparber, Shevin, Shapo, Rosen and Heibronner*, 586 So. 2d 1221 (Fla. 3d DCA 1991) (lawsuit filed alleging that the testamentary intent as expressed in the will was clear, but frustrated due to the lawyer's negligent failure in drafting the will).

[9] See *Davis v. Hathaway*, 408 So. 2d 688 (Fla. 2d DCA 1982) (reversing summary judgment due to the factual dispute regarding the scope of attorneys services in the sale of a business).

[10] See *Ginsberg v. Chastain*, 501 So. 2d 26 (Fla. 3d DCA 1986).

11 *Home Furniture Depot, Inc. v. Entevor AB*, 753 So. 2d 653, 655 (Fla. 4th DCA 2000).

[12] *Daytona Dev. Corp. v. McFarland*, 505 So. 2d 464 (Fla. 2d DCA 1987).

[13] *Home Furniture Depot, Inc.*, 753 So. 2d at 655.

[14] *Stake v. Harlan*, 529 So. 2d 1183, 1186 (Fla. 2d DCA 1988).

[15] *Goodwin v. Alexatos*, 584 So. 2d 1007 (Fla. 5th DCA 1991

[16] *KJB Village Property, LLC v. Craig M. Dorne, P.A.*, 727, 730 (Fla. 3d DCA 2011) ("If the client cannot show that it would not have suffered harm 'but for' the attorney's negligence, the client will not prevail.").

[17] *Silverstrone v. Edell*, 721 So. 2d 1173 (Fla. 1998).

[18] *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325, 330 (Fla. 4th DCA 1998).

[19] *Id.*

[20] *Schreiber*, 814 So. 2d 396 at 399.

[21] *Id.* (citing *Johnson v. Gibson*, 837 So. 2d 481 (Fla. 2nd DCA 2002)).

[22] *Id.* (Citing generally *Canaan v. Bartee*, 276 Kan. 116, 72 P.3d 911, 915-21 (Kan. 2003) (discussing the exoneration rule at length and collecting cases)).

[23] *Schreiber*, 814 So. 2d at 396; *Johnson*, 837 So. 2d at 482.

[24] 903 So. 2d at 370-371 ((quoting *Levine v. Kling*, 123 F.3d 580, 583 (7th Cir. 1997)).

[25] *Schreiber*, 814 So. 2d at 399.

[26] See *Manley v. Crawford*, 753 So. 2d 792 (Fla. 5th DCA 2000) (holding that legal malpractice suit was not possible because and the appeal was meritless as appellant failed to obtain appellate or post-conviction relief as a precondition to maintaining a legal malpractice action against appellee).

[27] §95.11(4)(a), Fla. Stat. (2013).

[28] *Id.*

[29] *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999).

[30] *Rosen v. Cazel*, 739 So. 2d 1267, 1268 (Fla. 4th DCA 1999) (citing *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999)).

[31] §95.11(2)(a), Fla. Stat. (2013).

[32] *Rowell v. Holt*, 850 So. 2d 474 (Fla. 2003).

[33] *Id.*

[34] *Rowell*, 850 at So. 2d at 477-478 (citing *R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 362 (Fla. 1995) (quoting *Reynolds v. State Farm Mut. Auto. Ins. Co.*, 611 So. 2d 1294, 1296 (Fla. 4th DCA 1992)).

[35] *Id.* at 478.

[36] *Id.* at 476-477.

[37] *Id.* ("In an action for legal malpractice, does the impact rule preclude recovery of noneconomic damages when the uncontroverted negligent failure to deliver a document that would have produced the immediate release of a pretrial detainee resulted in a protracted period of wrongful pretrial imprisonment with resultant emotional distress or psychological harm, but no physical impact?").

[38] *Id.* at 477.

[39] *Id.* 475-476.

[40] *Id.* at 481.

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