

## Malpractice Claims Against Criminal Defenders: A Chink in the Armor?

by Arthur J. Lachman

In the past 30 years, legal malpractice claims against criminal defense lawyers have become increasingly difficult to maintain. Dating back to the seminal 1974 UCLA Law Review article by Otto Kaus and Ronald Mallen,<sup>1</sup> which raised public policy issues associated with providing legal remedies to persons for whom criminal culpability has been established and who have at their disposal post-conviction relief procedures, a majority of courts have erected significant hurdles for criminal defendants who wish to sue their lawyers for malpractice. But there are signs that the legal landscape may be changing a bit, implicating loss prevention concerns for criminal defenders. This article will summarize the current law on the subject, and discuss some recent appellate decisions pointing to a subtle shift in how courts are viewing malpractice claims in the criminal defense context.

### Legal Principles Governing Malpractice Actions Against Defenders

Generally, as with any malpractice plaintiff, the criminal defendant suing his or her lawyer must establish by a preponderance

of the evidence the existence of a duty (which includes the existence of a lawyer-client relationship), breach of the duty, causation, and damages. In the criminal defense context, a majority of appellate courts have erected two additional hurdles, either as separate requirements or as elements of the causation prong of the general malpractice burden.<sup>2</sup>

First, convicted criminal defendants in many jurisdictions must pursue and obtain post-conviction relief as a prerequisite for asserting a legal malpractice claim. This requirement is most often justified on the grounds that post-judgment remedies beyond a direct appeal are not available to civil litigants, and criminal defendants should be not be permitted two bites at the apple that might result in inconsistent decisions. As discussed below, even jurisdictions not imposing this so-called “exoneration rule” recognize that the failure to pursue post-conviction remedies may prevent the criminal defense malpractice plaintiff from establishing that any damages proximately resulted from the lawyer’s breach of duty.

Second, courts often impose an additional requirement that the

criminal defense malpractice claimant establish actual innocence by a preponderance of the evidence. This requirement is based on the public policy that a guilty person should not be permitted to recover damages because of a lawyer’s negligent failure to avoid a conviction. While that policy could be implemented by treating guilt as an affirmative defense, most courts have declined to place the burden on the lawyer to establish the criminal defendant’s guilt, in part because of the likely confusion about burdens of proof. They reason that following the normal “trial with a trial” concept, in which the lawyer must prove by a preponderance of the evidence that but for the lawyer’s negligence the defendant could not have been found guilty beyond a reasonable doubt, is too confusing for an average jury. So, courts generally reverse the burden, requiring the complaining criminal defendant to establish actual innocence as an additional element of the malpractice claim.

In addition to erecting these burdens on claimants, there are at least three defenses available to lawyers alleged to have committed

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1140 Connecticut Ave. NW

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malpractice by criminal defense clients. First, most courts liberally apply collateral estoppel principles to preclude relitigating the criminal defendant's guilt. Thus, both guilty pleas and decisions denying post-conviction relief are commonly found to implicate collateral estoppel and foreclose an otherwise valid malpractice claim.

A second defense is statute of limitations. For courts requiring post-conviction relief, most hold that the statute is tolled while criminal defendants pursue post-conviction remedies. But some courts reject the fiction that criminal defendants don't actually suffer harm for purposes of applying statutes of limitation until post-conviction remedies are exhausted. Under the so-called "two-track" litigation approach, criminal defendants must file the malpractice action based on normal statute of limitations principles (including application of the discovery rule), but are entitled to a stay of that action until post-conviction proceedings are concluded.

Finally, a few jurisdictions recognize immunity for public defenders. Although two state appellate courts have held that public defenders are absolutely immune from suit,<sup>3</sup> the immunity is most often a *qualified* one, applying only to negligent (as opposed to wanton, willful, or malicious) conduct within the scope of the defender's employment. In some jurisdictions, statutes directly confer this qualified immunity on public defenders.<sup>4</sup> In others, the qualified immunity results from judicial interpretation of a more general immunity statute, with courts relying on practical and policy considerations regarding the unique role of public defenders, including their inability to refuse clients' cases and the public's interest in recruiting capable lawyers to represent indigent defendants.<sup>5</sup> Nevertheless, most courts considering the issue find that public defenders' role in representing individual clients is more akin that of private lawyers and reject the

application of any immunity in the legal malpractice context.<sup>6</sup>

### Recent Cases

While these principles are fairly well settled in many jurisdictions, there are signs that courts are taking a fresh look at some of the issues involving malpractice claims in the criminal defense context. Recent appellate decisions in Colorado, Washington, and Illinois suggest that there is reason for caution in assessing how the law will develop in the coming years.

In companion cases decided in February 2005, *Rantz v. Kaufman*<sup>7</sup> and *Smith v. Truman*,<sup>8</sup> the Colorado Supreme Court adopted the minority rule and refused to require criminal defendants to obtain post-conviction relief as a prerequisite to bringing a malpractice lawsuit. The court rejected as a legal fiction reasoning used in other jurisdictions that "harm" results to a criminal defendant only after exoneration in post-conviction proceedings. Also, while criminal defendants will often have difficulty establishing causation in the absence of prevailing in post-conviction relief proceedings, causation should be evaluated on a case-by-case basis and not be subject to a per se exoneration rule. In reaching this decision, the court noted that a "two-track" litigation approach satisfies the usual policy justifications for an exoneration rule. And because "postconviction remedies exist to protect constitutional rights of criminal defendants, not to protect negligent defense attorneys," the availability of such remedies "should not serve as an additional shield for attorneys who practice a particular form of law."

The Colorado appellate court also implicitly rejected an independent "actual innocence" element of a malpractice cause of action, noting that the policy of preventing criminal defendants from profiting from their conduct is adequately dealt with by requiring malpractice plaintiffs to prove that the lawyer's

negligence caused legally cognizable harm. Finally, the court held that obtaining post-conviction relief might well have preclusive effect under the doctrine of collateral estoppel, justifying a stay of the malpractice action pending completion of such proceedings. But where no post-conviction relief is sought, a malpractice action can proceed. The Colorado court, therefore, rejected the policy arguments presented by Kaus & Mallen 30 years ago and accepted by a majority of courts considering the issue since, essentially placing malpractice actions in the criminal defense and civil contexts on the same footing and giving recognition to the availability of additional relief in the criminal cases through the use of preclusion doctrine.

Courts in Illinois and Washington have recently reached what appear on the surface to be differing conclusions regarding whether the actual innocence rule applies when a criminal defendant asserts malpractice in the imposition of a penalty (as opposed to an improper conviction). In a March 2005 decision, *Paulsen v. Cochran*,<sup>9</sup> a division of the Appellate Court of Illinois considered whether dismissal of a malpractice claim against Johnnie Cochran's law firm should be upheld where the criminal defendant alleged malpractice in the computation of a fine included in a plea agreement and in the imposition of a jail sentence rather than probation. The court refused to create an exception to Illinois' actual innocence rule for legal malpractice "when a criminal defendant has pled guilty but does not believe that his attorney negotiated the best possible sentence." Because the court distinguished the facts in *Paulsen* from cases in other jurisdictions partly on the basis that it involved a plea agreement imposing a penalty within the statutory maximum, it isn't clear whether the court might be willing to create an exception to the actual innocence rule for sentences that are clearly unlawful.

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In contrast, a February 2005 Washington Court of Appeals decision, *Powell v. Associated Counsel for the Accused*,<sup>10</sup> expressly recognized a limitation on the actual innocence rule in the context of an unlawful penalty. As in Illinois, Washington appellate decisions have required that a criminal defendant prove actual innocence in order to prevail in a malpractice action involving an improper conviction.<sup>11</sup> In *Powell*, the defendant had pleaded guilty to a crime, but he alleged in the malpractice action that his lawyers' breach of the duty of care caused him to serve more than eight months in prison beyond the maximum sentence for his crime. The court concluded that the policy justifications for the actual innocence rule didn't apply to this unfair penalty, noting that "Powell's situation is closer to that of an innocent person wrongfully convicted than of a guilty person attempting to take advantage of his own wrongdoing." Even Kaus & Mallen were careful to limit their

early policy discussion to the fact of conviction itself,<sup>12</sup> and courts may well follow Washington's lead and begin limiting the application of the actual innocence rule outside the conviction context.

### Conclusion

As shown in the chart on page 6 summarizing the current law by jurisdiction, the legal hurdles facing criminal defendants pursuing legal malpractice claims remain substantial in many, if not most, jurisdictions. However, there are signs that backlash against limiting malpractice liability in this context may be having an impact. Defenders should make themselves aware of malpractice principles in their own jurisdictions, and monitor developments closely. In the meantime, implementing effective loss prevention measures to prevent claims from arising in the first instance remains crucial.

### Footnotes:

<sup>1</sup> Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L. Rev. 1191 (1974).

<sup>2</sup> See Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* §26.13 (2005 ed.).

<sup>3</sup> *Dziubak v. Mott*, 503 N.W.2d 771 (Minn. 1993) (applying public policy principles); *Coyazo v. State*, 897 P.2d 234 (N.M. Ct. App. 1995) (applying New Mexico statutory provisions, and citing *Herrera v. Sedilo*, 740 P.2d 1190 (N.M. Ct. App. 1987)).

<sup>4</sup> See, e.g., Conn. Gen. Stat. §4-165 (amended in 1976 to overrule decision denying immunity under the statute in *Spring v. Constantino*, 362 A.2d 871 (Conn. 1975)); §745 Ill. Comp. Stat. 19/5; Tenn. Code. §8-14-209.

<sup>5</sup> See, e.g., *Ramirez v. Harris*, 773 P.2d 343 (Nev. 1989); *Thorp v. Strigari*, 800 N.E.2d 392 (Ohio 2003); *Bradshaw v. Joseph*, 666 A.2d 1175 (Vt. 1995). See also *Vick v. Haller*, 512 A.2d 249 (Del. Super. 1986), *aff'd in part, rev'd in part on other grounds*, 522 A.2d 865 (Del. 1987); *Scott v. Niagara Falls*, 407 N.Y.S.2d 103 (N.Y. Sup. Ct. 1978).

<sup>6</sup> See, e.g., *Barner v. Leeds*, 13 P.3d 704 (Cal. 2000); *Schreiber v. Rowe*, 814 So.2d 396 (Fla. 2002); *White v. Galvin*, 524 N.E.2d 802 (Ind. Ct. App. 1988); *Donigan v. Finn*, 290 N.W.2d 80 (Mich. Ct. App. 1980); *Reese v. Danforth*, 406 A.2d 735 (Pa. 1979).

<sup>7</sup> 109 P.3d 132 (Colo. 2005).

<sup>8</sup> 2005 Colo. LEXIS 164 (Colo. Feb. 28, 2005).

<sup>9</sup> 826 N.E.2d 526 (Ill. App. 2005), appeal denied, 2005 Ill. LEXIS 911 (Ill. May 25, 2005).

<sup>10</sup> 106 P.3d 271 (Wash. App. 2005).

<sup>11</sup> *Faulkner v. Foshaug*, 29 P.3d 771, 773 (Wash. App. 2001); *Ang v. Martin*, 76 P.3d 787, 790 (Wash. App. 2003), review granted, 95 P.3d 352 (Wash. 2004).

<sup>12</sup> Kaus & Mallen, *supra*, 21 UCLA L. Rev. at 1194.

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## Reducing Risk in the Provision of Self-Help Services: Part II

by Arthur J. Lachman

Equal justice organizations offering self-help legal services to their patrons, including web-based kiosks, service centers, and information hotlines, face unique challenges in managing legal and ethical risks. Many, if not most, of these organizations recognize that providing these services will most often involve the rendering of legal advice to their patrons, at least in some limited way. There are also times when legal organizations legitimately desire to avoid the costs and risks associated with the legal and ethical duties imposed when a lawyer-client relationship is formed. The law is in transition, but it appears to be generally moving in the direction of recognizing the benefits that modern technology can offer in the delivery of legal services to low- and middle-income people. Assessing risk in this area, therefore, requires a clear understanding of the law in the lawyer's particular jurisdiction regarding how and when

lawyer-client relationships are formed, and the ethical duties imposed in limited and prospective representation situations.

Part I of this article, which appeared in the Winter 2005 Bulletin, presented a general overview of the law regarding the formation of attorney-client relationships, as well as a description of the current legal and ethical climate for assessing risk in this area. In Part II, these general principles will be applied to the most common self-help services, including websites, in-person service-centers/clinics, and telephone hotlines.

In order to minimize risks, lawyers and legal organizations offering self-help services should, when appropriate for the particular services being provided, (1) include carefully drafted and conspicuous disclaimers, (2) maintain control over the content of services so as to know if and when the line to providing legal advice has been crossed, (3) train personnel on

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the limits of services that will be offered and how to identify and resolve situations when misunderstandings or difficulties arise, and (4) create systems for dealing with situations when lawyer-client relationships are formed, or when duties are imposed in prospective client situations.

### Technology-Based Interactions

Control of content is the principal advantage of Web-based offerings. If the provider legitimately intends to provide information rather than legal advice, a conspicuous disclaimer should so inform Web-site users, adding that that no lawyer-client relationship is being formed as a result of the patron's use of the site, and that persons wanting to obtain legal advice should consult a lawyer. Links to disclaimers may or may not be enough; placing the disclaimer directly on the page where information is offered, or using a "click-through" page that requires the patron to acknowledge reading the disclaimer before proceeding, is the safest course.

However, "even the use of a disclaimer may not prevent the formation of attorney-client relationships if the parties' subsequent conduct is inconsistent with the disclaimer."<sup>1</sup> The question whether Web-based resources can be sufficiently interactive as to constitute the practice of law has not been resolved in the courts. In a widely publicized 1999 case, a Texas federal district court held that an interactive commercial website for the completion of legal forms constituted the unauthorized practice of law, but that decision was later vacated after corrective action by the Texas Legislature.<sup>2</sup> While some cases and commentary discussing self-help in the context of "unauthorized practice" issues tend to focus on whether there is personal (rather than non-personal or electronic) interaction,<sup>3</sup>

using a computer to "interface" with a customer does not alter the underlying relationship between the service and the user. The choice of a medium is not determinative. . . . [I]f someone at the information service were actually generating legal advice during an online session, that would be the practice of law.<sup>4</sup>

There is little doubt, therefore, that if lawyers provide a mechanism through the Internet to exercise professional judgment in making specific legal recommendations to individual patrons, lawyer-client relationships will be formed. Certainly sites offering direct interactive communications with other people through emails or chat rooms may result in the formation of lawyer-client relationships.<sup>5</sup> But even less direct interaction, such as assistance in completing legal forms and documents online, may create such relationships, and offering

these types of services requires careful analysis of applicable state law and the resolution of close legal and policy questions.

Thus, for self-help Website providers desiring to make sites more useful and relevant without crossing the line to providing legal advice, minimizing risk requires at the very least carefully considering and continuously monitoring site content (including links to other Websites), ensuring that interactive assistance offered is not tailored to the unique (and possibly confidential) facts of a particular patron's circumstances communicated by that patron, and using appropriate and conspicuous disclaimers. Web site providers are also encouraged to comply with the ABA Law Practice Management Section's Best Practices Guidelines for Legal Information Web Site Providers, as adopted by the ABA House of Delegates in February 2003.<sup>6</sup>

### In-Person Self-Help Service Centers/Clinics/Seminars

Once we move from electronic access to human interaction, control becomes a much more difficult issue. It's one thing to instruct lawyers and self-help service providers to avoid providing legal advice based on specific patron questions; it's quite another to make sure that it doesn't happen. Thus, in presenting seminars or conducting group clinics for non-lawyer patrons, it is prudent to remind attendees that the lawyer's discussion in response to questions will be general and not intended as individual advice for specific problems, to ensure that no confidential information is divulged to the lawyer, and to consider having participants disavow legal representation in writing.<sup>7</sup>

Fortunately, it is in the area of providing in-person self-help services that the federal and state judiciary have been most active, creating publicly available resources and guidelines that lawyers offering similar services can borrow in preventing the creation of lawyer-client relationships.<sup>8</sup> Using these materials as a starting point, legal aid organizations can formulate policies to minimize risk regarding, among other things,

- responding to patron questions;
- providing basic legal information;
- avoiding the receipt of confidential information;
- advising patrons on the choice and use of forms;
- using disclaimers (including content, posting, and written patron acknowledgment);
- making referrals when legal advice is appropriate or is requested; and
- training service providers.

Nevertheless, in formulating these policies, lawyer self-help providers should keep in mind that the ethical rules may impose obligations and constraints upon them that court staff need not

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worry about. For example, as discussed in Part I of this article, new Model Rule of Professional Conduct 1.18 imposes duties regarding confidentiality and conflicts of interest in the context of prospective client situations. Lawyers also have an ethical obligation to train and supervise staff. And when lawyer-client relationships are inadvertently created, procedures must be in place to facilitate compliance with legal and ethical obligations under relevant state law.

### Telephone Hotlines

Telephone hotlines generally involve rendering legal advice, at least in some limited form, so they will most often result in the creation of lawyer-client relationships triggering at least some ethical duties. As noted in the ABA Standards for the Operation of a Telephone Hotline Providing Legal Advice & Information,<sup>9</sup> adopted by House of Delegates in August 2001,

Some hotline services advance a position that they only offer information, and not advice, and therefore are not subject to the application of the rule [of professional conduct]. If a service only offers information under all circumstances and does not offer advice based on the facts presented by individual callers, the service may be able to justify this position. But if the hotline service has the capacity to offer fact-specific advice to callers, even though in some circumstances the personnel only provide information, the personnel are practicing law and the rules of professional conduct apply to them.

Because of the difficulty in controlling what occurs in telephone settings, and due to the fact that written disclaimers are not practicable in such settings, information-only hotline programs should adopt strict procedures and oversight if the goal is legitimately to prevent lawyer-client relationships from forming (and, once again, to ensure that ethical duties to prospective clients are met). From a risk management perspective, where both advice and information may be offered to callers, the safest course is to treat all calls as creating representation situations.

### Conclusion

There is no evidence that the trend in recent years of permitting lawyers to provide more limited legal services has led to any increase in claims against them.<sup>10</sup> Although an irrational fear persists that anything less than full representations is incompetent representation, and while courts have occasionally imposed malpractice liability for failing to advise clients of issues collateral to the limited matter undertaken,<sup>11</sup> the fact is that when consumers of legal services have a clear understanding of what services will be provided, and those that won't, claims are not nearly as likely to occur.

As we begin the 21st Century, the ethical rules in place or being considered for adoption in many jurisdictions recognize the important policy justifications for permitting lawyers to provide limited services to persons who cannot afford full, or any, legal representation. Legal service organizations providing purely self-help services that adopt effective risk management procedures should be able to minimize any potential losses, as well as limit their duties to prospective clients. In short, in working to meet the needs of all who seek access to our justice system, what we truly have to fear is fear itself.

### Footnotes

- <sup>1</sup> D.C. Bar Ethics Op. No. 316 (July 2002); see also Catherine J. Lancot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 Duke L.J. 147, 186-96 (1999); Joan C. Rogers, *Cyberlawyers Must Chart Uncertain Course in the World of Online Advice*, 16 ABA/BNA Lawyers' Manual on Professional Conduct, Special Report 96, 98-100 (2000).
- <sup>2</sup> *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 1999 U.S. Dist. LEXIS 813 (N.D. Tex. Jan. 22, 1999), vacated, 179 F.3d 956 (5th Cir. 1999).
- <sup>3</sup> See, e.g., Melissa Blades & Sarah Vermeylen, *Virtual Ethics for a New Age: The Internet & the Ethical Lawyer*, 17 Geo. J. Legal Ethics 637, 651-52 (2004); William A. Scott, *Filling in the Blanks: How Computerized Forms are Affecting the Legal Profession*, 13 Alb. L.J. Sci. & Tech. 835, 843-53 (2003); Steve French, *When Policies Collide . . . Legal "Self-Help" Software & the Unauthorized Practice of Law*, 27 Rutgers Computer & Tech. L.J. 93 (2001); Oregon State Bar v. Gilchrist, 538 P.2d 913 (Or. 1975); New York County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984 (App. Div. 1967), rev'd and dissenting opinion adopted, 287 N.Y.S.2d 422, 234 N.E.2d 459 (N.Y. 1967).
- <sup>4</sup> Oregon Formal Ethics Op. No. 1994-137 (online at [http://www.osbar.org/\\_docs/ethics/1994-137.pdf](http://www.osbar.org/_docs/ethics/1994-137.pdf)). See also Joel Michael Schwarz, *Practicing Law Over the Internet: Sometimes Practice Doesn't Make Perfect*, 14 Harv. J. Law & Tech. 657, 701-06 (2001) (discussing the Oregon ethics opinion and the Texas decision in *Parsons*).
- <sup>5</sup> See D.C. Bar Ethics Op. No. 316 (July 2002); Ill. State Bar Ass'n Op. No. 96-10; Phila. Bar. Ass'n Ethics Op. 98-6.
- <sup>6</sup> On-line at [http://www.elawyering.org/tools/best\\_practice\\_guidelines.pdf](http://www.elawyering.org/tools/best_practice_guidelines.pdf). The Maryland Legal Assistance Network's version of this list can be found at <http://temp.peoples-law.org/finding/legal-sites/select%20websites.htm>.
- <sup>7</sup> See Ohio Sup. Ct. Bd. Of Comm'rs on Grievances & Discipl., Op. No. 94-13 (1994); Mich. Informal Ethics Op. RI-301 (1997).
- <sup>8</sup> See, e.g., Judicial Council of Calif., Admin. Office of the Courts, Access & Fairness Advisory Comm., *May I Help You?: A Resource Guide for Court Clerks* (2003) (available online at <http://www.courtinfo.ca.gov/programs/access/documents/mayihelptyou.pdf>); Jona Goldschmidt et al., *Meeting the Challenge of Pro Se Litigation: A Report & Guidebook for Judges & Court Managers* (AJS/SJI 1998); Florida Family Law Rule 12.750.
- <sup>9</sup> On-line at <http://www.abanet.org/legalservices/downloads/delivery/hotlinestandards.pdf>.
- <sup>10</sup> See Forrest S. Mosten, *Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte* 96 (ABA Law Pract. Mgmt. Sec. 2000); 2004 Symposium Transcript, *Access to Justice: Does it Exist in Civil Cases?*, 17 Geo. J. Legal Ethics 455, 492-93 (2004) (referencing a report of some resistance by insurers to limited scope representations in the hotline context, "even though there is no evidence that there is any great increase in exposure").
- <sup>11</sup> See, e.g., *Nichols v. Keller*, 15 Cal. App. 4th 1672, 19 Cal. Rptr. 2d 601 (1993); *Keef v. Widuch*, 747 N.E.2d 992 (Ill. App.), appeal denied, 755 N.E.2d 478 (Ill. 2001).

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# Criminal Defender Malpractice — By Jurisdiction (As of April 30, 2005)

	Post-conviction relief (PCR) required?	Limitations period tolled pending PCR proceedings? <sup>2</sup>	Proof of actual innocence required?
<b>Alaska</b>	Yes	Yes	
<b>Arizona</b>	Yes	Yes	
<b>California</b>	Yes	Yes	Yes
<b>Colorado</b>	No	No	No(?) <sup>3</sup>
<b>Florida</b>	Yes	Yes	Yes
<b>Idaho</b>		No	Yes
<b>Illinois</b>	Yes	Yes	Yes
<b>Indiana</b>	No	No	
<b>Iowa</b>	Yes	Yes	
<b>Kansas</b>	Yes		
<b>Kentucky</b>	Yes		Yes
<b>Maryland</b>	Yes	No	
<b>Massachusetts</b>	Yes		Yes
<b>Michigan</b>	No	No	
<b>Minnesota</b>	Yes	Yes	
<b>Mississippi</b>	No	No <sup>4</sup>	
<b>Missouri</b>	???	???	Yes
<b>Montana</b>	No	No	
<b>Nebraska</b>	No	No	Yes
<b>Nevada</b>	Yes	Yes	
<b>New Hampshire</b>			Yes
<b>New Mexico</b>	No(?) <sup>7</sup>	No	
<b>New York</b>	Yes	Yes	Yes
<b>North Carolina</b>			No <sup>8</sup>
<b>Ohio</b>	No		
<b>Oregon</b>	Yes	Yes	
<b>Pennsylvania</b>	Yes	No	Yes
<b>South Carolina</b>			Yes
<b>Tennessee</b>	Yes	No	
<b>Texas</b>	Yes		Yes
<b>Virginia</b>	Yes <sup>9</sup>	Yes	Yes
<b>Washington</b>	Yes		Yes <sup>10</sup>
<b>Wisconsin</b>			Yes

- 1 Based either on (1) state supreme court decisions, or (2) intermediate appellate decisions where there is no apparent conflicting authority. This chart is provided for informational purposes only; the issues have not been exhaustively researched or analyzed based on particular state laws or procedures. Omitted states and blank boxes signify that no clear authority has been found. If an issue arises directly affecting your own practice or particular client situations, you should conduct independent research regarding the governing legal principles for your jurisdiction.
- 2 Or, stated differently, does the cause of action accrue when post-conviction relief is obtained? In jurisdictions where the limitations period is not tolled or the cause of action accrues at some earlier time, courts generally adopt

a two-track litigation process in which the malpractice action is stayed pending completion of post-judgment relief proceedings.

- 3 A requirement that a criminal defendant asserting a legal malpractice claim prove actual innocence appears to have been implicitly rejected by the Colorado Supreme Court in *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005).
- 4 The Mississippi Court of Appeals decision in *Hymes v. McIlwain*, 856 So.2d 416 (Miss. App. 2003), concluded that the statute of limitations was not tolled during the pendency of post-conviction relief proceedings, but didn't discuss whether it approved of a two-track litigation process as described in Note 2 above.
- 5 Compare *Jepson v. Stubbs*, 555 S.W.2d 307 (Mo. 1977) (assuming for statute of limitations tolling purposes that post-conviction relief is not required to pursue a legal malpractice claim based on negligence in advising regarding a guilty plea), with *Johnson v. Schmidt*, 719 S.W.2d 825 (Mo. App. 1986) (a malpractice action against criminal defense counsel is premature "until such time as plaintiff is successful in securing post-conviction relief upon a finding that he was denied effective assistance of counsel").
- 6 Compare *Jepson*, supra (statute not tolled pending completion of post-conviction relief proceedings), with *Johnson*, supra (action "premature" until post-conviction relief obtained).
- 7 The New Mexico Court of Appeals appeared to implicitly reject a post-conviction relief requirement in *Duncan v. Campbell*, 936 P.2d 863 (N.M. App.), cert. denied, 936 P.2d 337 (N.M. 1997).
- 8 North Carolina appellate courts have rejected a bright-line actual innocence requirement, but have noted that criminal defendants have a "high burden" to establish proximate cause. See *Dove v. Harvey*, 608 S.E.2d 798 (N.C. App. 2005) (affirming Rule 12(b)(6) dismissal of malpractice claim on proximate causation grounds, but noting that the plaintiff failed to "plead actual innocence in his complaint"); *Belk v. Cheshire*, 583 S.E.2d 700 (N.C. App. 2003).
- 9 But see *Taylor v. Davis*, 576 S.E.2d 445, 447 (Va. 2003) (post-conviction relief not required where the criminal defendant is actually innocent as a matter of law because the purported offense for which he was convicted did not constitute a crime at the time he was charged, and he is unable to establish actual innocence because of his lawyer's negligence).
- 10 See *Faulkner v. Foshaug*, 29 P.3d 771, 773 (Wash. App. 2001) (Alford plea does not preclude criminal defendant from asserting actual innocence in malpractice action); *Powell v. Associated Counsel for the Accused*, 106 P.3d 271 (Wash. App. 2005) (actual innocence rule inapplicable in malpractice action alleging unfair penalty rather than wrongful conviction).

## Joint Defense Agreements: Tips for Minimizing Risk

A joint defense agreement (JDA) generally permits criminal defendants and their counsel to share confidential information under the cloak of the lawyer-client privilege and/or the work product doctrine. In drafting and executing JDAs, counsel should take into account all relevant liability and ethical risks. Here are some tips:

- Carefully analyze whether it is in your client's interest to be a party to a JDA.
- Carefully research the relevant jurisdiction's law regarding the operation of the common interest privilege in the criminal defense context, including the elements of such a privilege and the time when it is deemed to come into existence. A JDA should not be executed until all the elements of the common interest privilege exist, and the JDA should reference the date on which the privilege is effective.
- Carefully evaluate the ethical duties in your jurisdiction, including appropriate client consent requirements to disclose confidential information, responsibilities to communicate with your client regarding privilege and work product protections (including any risks that such protections could be waived), and any potential conflict of interest issues associated with your obligation to maintain confidentiality as to information obtained from non-client defendants.
- Do not share confidential information or exchange confidential documents until a common interest exists and the JDA is executed.
- The JDA should be written rather than oral, signed by all parties and their counsel, describe the common interest of the parties, explain what information is protected under the agreement (the agreement should permit, but not require,

*Do not share confidential information or exchange confidential documents until a common interest exists and the JDA is executed.*

- disclosure of confidential information), and cite the authority for the privilege being asserted.
- The JDA should state that no lawyer-client relationship is being created between the lawyer for one defendant and any other member of the joint defense group, and that the representation being provided by a lawyer signing the JDA is for the benefit of that lawyer's client only.
- As counsel for a party executing a JDA, limit exposure to other defendants' confidences not required for the joint defense effort, and avoid any conduct or statement indicating that you are serving as other defendants' counsel or that you are acting to protect another defendant's interests.
- Beware of the crime/fraud exception to the attorney-client privilege: do not participate in any conduct or communication under the JDA in which your services are being used to perpetuate a crime (e.g., obstruction of justice) or fraud.
- Assess the risks associated with withdrawal provisions of JDAs carefully. The JDA should require notice to all parties when a defendant withdraws from the joint defense group. It should also spell out the consequences of a defendant's decision to testify adversely to the parties' common interest. Based on concerns about conflicts of interest, some courts are now requiring that JDAs include a waiver of the right to be cross-examined regarding the defector's communications under the JDA in this situation. See, e.g., *United States v. Almeida*, 341 F.3d 1318 (11th Cir. 2003); *United States v. Stepney*, 246 F. Supp. 2d 1069 (N.D. Cal. 2003). In order to avoid conflict of interest problems and reduce the risk of disqualification, counsel should consider including such a waiver in the JDA even in the absence of a clear requirement to do so, taking into account that such a provision may have the effect of discouraging the sort of open communication among defendants that JDAs are designed to encourage.

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For more information about the NLADA Insurance Program, please contact: Kevin Horsted, Vice President, [k.horsted@nlada.org](mailto:k.horsted@nlada.org)