

# BNA Insights

## MALPRACTICE

### ENVIRONMENTAL LITIGATION

Environmental lawyers, like all other attorneys, are regularly sued for malpractice, no matter how conscientious and careful they have been. In many ways, legal malpractice claims in the environmental law world are no different from malpractice claims in other areas. There are tools to protect against being sued and to support a defense. The authors examine some typical claims brought against environmental lawyers and discuss means of preventing claims in the first place and defending them in the event claims are filed.

## Why Do Environmental Lawyers Get Sued for Malpractice? What Can They Do to Avoid a Malpractice Claim?

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**E**nvironmental lawyers, like all others, are regularly sued for malpractice, no matter how conscientious and careful they have been. Like all lawyers, they have tools to protect against being sued and to support a defense if sued. We look at some typical claims brought against environmental lawyers and discuss how claims can be prevented or defended.

Here are examples of malpractice claims against lawyers based on environmental issues.

1. A local governmental entity defaulted on its bonds because of an unforeseen environmental problem that prevented the development of property it had undertaken to fund. After the bonds were issued the U.S. Army Corp of Engineers reported that the property had been a World War II bombing site and might contain unexploded ordnance. All development stopped. The government entity sued its lawyers for not conducting an environmental investigation and not describing the risks in property development. *SCB Diversified Mun. Portfolio v. Crews & Assocs.*, No. 09-7251, (E.D. La.,

Jan. 4, 2012), *aff'd Coves of the Highland Comm. Dev. Dist. v. McGlinchey Stafford, P.L.L.C.*, No. 12-30096, 2013 BL 122615 (5th Cir. May 7, 2013).

2. A landfill developer sued its lawyers after losing a landfill permit because the lawyers did not give notice to two adjacent landowners. (The substantive legal issue related to the permit was whether notice of the application had to be given to land owners within 250 feet of the *proposed landfill* or of the *property line*.) The shareholders of the corporation also sued the lawyers to recover their damages claiming that they could not sell their shares because of the loss of the permit. *Env'tl. Control Sys., Inc. v. Long*, 301 Ill. App. 3d 612, 703 N.E.2d 1001 (5th Dist. 1998).

3. The clients, who had purchased commercial property, sued their lawyer charging that he never informed them of environmental violations on the property or the consequence of the "as is" clause in their purchase agreement. *Barnett v. Schwartz*, 47 A.D.3d 197, 848 N.Y.S.2d 663, 2007 BL 171585 (App. Div. 2007).

4. A client agreed to sell real estate to a third party. Between signing the contract and closing, New Jersey enacted an environmental cleanup law that imposed significant new responsibilities on owners of industrial property. The client sued the lawyer for the cleanup costs it would incur, charging that the lawyer had failed to tell it about the new law. *Dixon Ticonderoga Co. v. Estate of William F. O'Connor*, 248 F.3d 151 (3d Cir. 2001).

5. A lawyer represented a property owner in litigation against several parties in an attempt to recover costs paid to clean up contamination. After that case settled the client sued the lawyer, claiming that the lawyer failed to pursue all relevant parties in the cleanup lawsuit, failed to conduct necessary discovery, and failed to submit sufficient evidence to avoid summary judgment.

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*The opinions in this article do not represent the views of Bloomberg BNA, which welcomes other points of view.*



*Pitsch v. Blandford*, 690 N.W.2d 120, 264 Mich. App. 28 (Ct. App. 2004).

These cases show that a malpractice claim can be based on almost anything that a lawyer might do that involves (or later turns out to involve) environmental issues. The examples arise out of environmental litigation, real estate transactions, permit applications and public agency financing. The damages claimed were based on deals that were scuttled, clean-up costs incurred, litigation lost (or badly settled), and stock that could not be sold. To draw some lessons on how to avoid these sorts of claims, let's look at the law that applies to them.

## The Elements of a Legal Malpractice Claim

Malpractice claims are generally governed by state law. The exact formulation varies from state to state, but generally ask the following four questions:

(1) Did the lawyer act negligently? In this context "negligence" means that the lawyer failed to apply the standard of care customary to someone in the lawyer's position.

(2) Was the lawyer's alleged negligence within the scope of what he or she was hired to do (was it within the engagement)?

(3) Did the alleged negligence proximately cause injury to the client?

(4) Can damages be proven and in what amount?

Litigating these elements is an exercise in *déjà vu*. The malpractice case relitigates the underlying case (called the "case within a case") or re-lives the underlying transaction, asking if it would have come out differently for the client had the lawyer not been (allegedly) negligent.

Looking at each element, what can the lawyer do to protect him or herself against a claim?

**Negligence.** The Restatement (Third) of the Law Governing Lawyers, § 52, describes the lawyer's duty as "exercis[ing] the competence and diligence normally exercised by lawyers in similar circumstances." Most state-law formulations are similar. Almost all jurisdictions require expert witnesses to establish the standard of care, on the assumption that in most cases jurors won't have any way to determine the standard based on their own personal experience.

Because environmental law may be considered to be a specialty, the environmental lawyer will likely be held to the standard of care of specialists in the field. Therefore, in most environmental malpractice litigation, the expert hired by the defense or by the plaintiff should be a practicing environmental lawyer or an academic familiar with the practice in that area, as opposed to a member of the bar without that knowledge. A legal ethics expert may also be appropriate in some cases, particularly if the claim is based on an alleged conflict of interest.

One important (and obvious) step to avoid malpractice liability is to know what is required of a lawyer handling the type of work being done, and to comply with that standard. This suggests, for example, that someone who does not regularly practice in a particular area think twice before accepting an engagement that re-

quires special knowledge or skill, or at least work with a lawyer who has that special knowledge.

**Scope of engagement.** Whether a lawyer's actions meet the standard of care is determined in the context of what the lawyer was asked to do. Often there is no dispute that the alleged mistake occurred in doing a task that the lawyer took on. But in a surprising number of cases there is disagreement over the scope of the engagement.

The lawyer can eliminate this sort of uncertainty at the outset of the representation by clearly and explicitly delineating the scope of the engagement in a written engagement letter. The letter should spell out the tasks the lawyer has agreed to undertake and state that unless the scope of the engagement is altered by mutual agreement in writing, the lawyer is not responsible for any other tasks. The lawyer may also want to specify examples of tasks for which the lawyer is not responsible. The letter should identify who is the client and who is not. ("I will represent the XYZ Corporation, but not its shareholders, directors, officers or employees.")

The engagement letter may not be a complete defense if the client credibly claims that the lawyer agreed to take on additional tasks and failed to carry them out properly, or if the client claims that even though the lawyer did not agree to take on Task B, a lawyer exercising reasonable care should have advised the client while handling Task A that Task B required attention. A client may also challenge the limited scope of the engagement if the limitation was not reasonable or if the lawyer failed to explain adequately the risks of the limitation so that the client did not give informed consent.

Nevertheless, an engagement letter that clearly outlines the scope of the lawyer's undertaking can be a valuable tool in defending the lawyer against claims that the lawyer failed to do something that fell outside that scope. If the engagement letter provides for a formal method for documenting changes to the lawyer's engagement – and if the lawyer adheres to the agreed limitations on the scope of services – the lawyer is more likely to be protected against after-the-fact assertions that the lawyer was supposed to take on tasks that were not described in the engagement letter.

In *SCB Diversified*, cited above, the lawyers successfully relied on their engagement letter to defeat a malpractice claim. In granting summary judgment, the Court stated:

The engagement letter clearly defines the scope of the representation contemplated between Plaintiff and [the Lawyers]. [The Lawyer's] role in the venture consisted of assisting Plaintiff in its formation under Louisiana law and in issuing bonds. As expressly stated, [the Lawyer's] review of the [bond offering memorandum] did not include the section regarding the development, which is where the mention of a Phase I Environmental Site Assessment is located.

There is another aspect to the scope-of-the-engagement issue: Even if the claim arises from a task that the lawyer agreed to do, how much should the lawyer have done? Suppose the lawyer is defending a client against a claim that the client has contributed to the contamination of a site. The lawyer will examine the available history for the property and look for evidence of prior owners or others (or adjacent landowners) who may have contributed to any contamination. If the lawyer fails to find others, but it later turns out there were some, the client may claim that the lawyer breached the standard of care. Whether the lawyer did so may de-



pend upon limitations the client placed on the work to be done and the expense to be incurred in identifying other potentially responsible parties.

A client may not be willing to pay to have the lawyer engage in an exhaustive search for all evidence of other polluters no matter how far back in time. A decision to limit the search because of cost or time constraints may seem reasonable before the fact. But, if it later turns out that relevant information was not discovered because of those limitations, the lawyer will likely be blamed for failing to turn over every stone.

What can a lawyer do to protect against this risk? The lawyer should discuss with the client the pros and cons of expending time and incurring significant fees on potentially useful but discretionary discovery or investigation. That consultation – and the conclusion reached – should be confirmed in writing to the client. This protects the lawyer against later claims of not having done enough. It may also reveal misunderstandings between the client and the lawyer about what the client expects the lawyer to do that then can be addressed and rectified before a problem arises.

In *Barnett v. Schwartz* cited above, the lawyer claimed to have discussed with his client the limited inquiry that he had made into the possible contamination of the property being purchased. He testified that he told the client that the client had the option of having an environmental analysis of the property performed, but the client decided against it due to the cost. The client denied the lawyer's testimony, and the jury apparently believed the client. 47 A.D.3d at 201. Obviously, a confirming letter from the lawyer written at the time could have made a big difference.

Another issue that generates lawsuits is the question: When does the engagement end? Was the lawyer still responsible for the matter when the alleged mistake or omission occurred? For example, does the engagement end when a site remediation plan is approved by the state or federal EPA, or does it continue until the work is completed? Does it extend to identifying or dealing with claims by third-parties? The engagement letter can provide answers that avoid future disputes and claims.

**Who is the client?** This issue also leads to a surprising amount of malpractice claims.. Generally, the duty of care extends only to the client (or clients). (There are limited exceptions in some states for third-party beneficiaries of the lawyer-client relationship.). Examples of situations where the identity of the client is less than clear – or where the lawyer may owe duties to non-clients – are almost endless.

Consider these examples: When a municipality promises to clean up a site after its own activities contributed to contamination, and contracts with a private party to do so, if a lawyer represents the private party, is the lawyer assuming any duties to the municipality? When a client seeks a loan for environmental clean-up, and the lender asks for the lawyer's input on what will be an acceptable remediation plan to the EPA, has the lawyer assumed any duties to the lender in describing what would be acceptable? The answer is likely to determine who is entitled to sue the lawyer for malpractice.

The identity of the client (and, sometimes, specifying who is *not* the client) should be made clear in the engagement letter. It would be prudent in many situations like those listed above to suggest to the third-party that it obtain its own counsel and, in any case, to state

clearly that the lawyer is not representing the third party, and that the third party may not rely on the lawyer's advice.

The identity of the client may also bear on the scope of the engagement. If the lawyer is hired by one of several potentially responsible parties – say a subsidiary corporation and its parent – is the lawyer working for the sub, the parent or both?

In the *Env'tl. Control Sys.* case cited above the shareholders of the plaintiff corporation claimed that the lawyer-defendant had represented both the corporation and its shareholders. There was no engagement letter. The court denied summary judgment, rejecting the lawyer's argument that he did not represent the individuals; the court treated it as a fact question for trial. 301 Ill. App. 3d at 618.

The engagement letter may provide protection for the lawyer by confirming that there are no other entities or individuals who are entitled to look to the lawyer for advice. Or, if individuals are involved, and the lawyer may properly do so, the engagement letter may afford a basis to limit the scope of the representation of those individuals. If the lawyer is to represent multiple parties, possible conflicts among them need to be considered and rules laid down at the outset of the representation concerning what will happen if an actual conflict later arises. A well-drafted engagement letter may establish rules that can help avoid a later disqualification if differences arise among clients.

**Loss causation.** In order to pursue a claim for malpractice, the lawyer's breach of the duty of care must have injured the client. Some jurisdictions state the causation standard more strictly than others. They require the client to prove that "but for" the lawyer's breach of the standard of care the client would not have been injured. Other jurisdictions only require that the lawyer have "substantially contributed" to the client's loss.

The "but-for" standard is more favorable to the lawyer. It implements the policy that a lawyer is not an insurer of the client's legal objectives, and is only liable for a breach of the standard of care when *but for* the lawyer's breach the client would not have been harmed. If the harm would have occurred in any case, or if the client cannot prove that but for the lawyer's conduct it would not have been harmed, the lawyer is not liable. In some cases the causation issue is more complex. Even if the client can prove that but for the lawyer's conduct the client would not have incurred a loss, that loss may be due to a factor outside the lawyer's control. Usually there will be little that a lawyer can do in advance to shape the future application of the loss causation rule.

**The case-within-a-case.** As noted above, in most jurisdictions the loss causation rule leads to the need to litigate a case-within-a-case as part of malpractice lawsuits. Most jurisdictions apply the same principle in transaction-based malpractice cases. The client must show that but for the lawyer's breach the transaction would have come out more favorably to the client. This can be especially complicated (and difficult for the client to prove) if the client must prove how a negotiation would have turned out, for example, if the lawyer had advanced different arguments or offers.

**Actual damages.** A plaintiff must prove damages that are not speculative and must provide a reasonable basis to compute them. Where the loss is something other than a monetary judgment paid by the plaintiff, the issue of what constitutes damage is more complicated.



For example, where the client claims that the lawyer's negligence resulted in the failure to obtain the ability to redevelop a parcel of land, or limits how the land may be used, how do you measure the resulting loss? It may be that valuation experts can establish a theoretical market value for the property if it were not subject to limitations on its use.

Even where a judgment has been entered against the client, the amount of the judgment alone may not be sufficient to establish recoverable damages. In many jurisdictions the malpractice plaintiff must prove an actual out-of-pocket loss – that is, a loss that the plaintiff has paid. In those jurisdictions, even if the client can prove that lawyer's negligence caused a judgment to be entered against a client in the underlying lawsuit, the client may not recover anything in the malpractice action if the client did not actually pay the judgment.

What if the judgment against a client for contaminating a site or injuring a neighbor's land was paid by the client's insurer or by a third party on behalf of the client? Some jurisdictions do not apply the collateral source rule to legal malpractice claims. Thus, if the client's insurer or a third party paid the judgment on behalf of the client, the client may not be able to prove that it incurred any actual damages, and may not be able to recover the amount of the judgment from the lawyer. Other jurisdictions are more permissive and allow clients to recover the amount of an adverse judgment even though the client has not paid the judgment, or has not paid it in full.

### Lawyers' Defenses and Claims

A lawyer has several defenses that may be asserted, as well as claims that the lawyer may make to shift some or all of the damages to others. These include the comparative fault defense and contribution claims by which the lawyer attempts to show that the negligence of the client, the client's agent, another lawyer or a third party caused or contributed to the client's loss. The lawyer may also assert that the act of one of these other parties was an "intervening cause" that completely relieves even a negligent lawyer of responsibility for the client's loss.

Defenses based on statutes of limitations or repose are also a frequent part of legal malpractice litigation. These defenses often generate disputes over when the malpractice claim against the lawyer accrues. In some jurisdictions, for example, the statute of limitations or statute of repose may begin to run even though the lawyer continues to represent the client. Moreover, statutes of repose can run and bar a case before the client learns of or even incurs any harm. But, a statute of limitations

period (and, in some jurisdictions, a statute of repose) may be tolled or the lawyer may be estopped from relying on such time-based defenses if a court finds equitable grounds for doing so based on the facts of the case.

### Conflicts

Lawyers representing malpractice plaintiffs routinely search for and seek to exploit any conflicts between the former client and the former lawyer. In the environmental arena, such conflicts can arise in several ways. If the lawyer has an economic interest in his client's enterprise or products it may generate a conflict claim. Such an engagement will raise issues under the state's version of ABA Model Rule 1.8. If the transaction is not handled appropriately (for example, by obtaining informed client consent, with a recommendation that the client get independent legal advice) and something later goes wrong, the now-former client will likely claim that the transaction was presumptively fraudulent and seek to link it to his later harm.

Or the malpractice plaintiff may accuse the lawyer of being conflicted if the lawyer jointly represented several parties with differing interests in the same site. As noted earlier, one common source of conflicts arises where it is unclear whether a representation has terminated, which may enable the plaintiff to claim that it remained a client long after the lawyer believed that the relationship had ended, and to claim the protections of the more stringent conflict rules that apply to clients, as opposed to former clients.

A lawyer could also include in an engagement letter that any disputes will be arbitrated (assuming the lawyer's professional responsibility insurance policy does not foreclose such agreements). The arbitration clause could spell out the level of expertise required of the arbitrator. Then if the lawyer views a confidential trial before an arbitrator as a better option than a public jury trial, there will be a basis to avoid the jury trial.

### Conclusion

In many ways, legal malpractice claims in the environmental law world are no different from malpractice claims in other areas. The elements are the same and the steps a lawyer can take to reduce the possibility of being sued for malpractice are basically the same. The keys are threefold: (i) document precisely the relationship, the parties to it and the tasks to be undertaken – and those that are not included, (ii) understand what a lawyer working in the field normally does, and (iii) perform those tasks competently.

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