

Punitive Damage Awards and Legal Malpractice Cases

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The potential for exemplary and punitive damage awards exists in legal malpractice cases, though is rarer than other components of damages. Because punitive damages typically are not covered by professional liability insurance, they may pose a significant financial threat to applicable litigants. The ability to recover punitive damages, and whether those damages are subject to a cap, is controlled by each state's jurisdictional rule.

Punitive damages may make up a portion of a compensatory damage calculation in legal malpractice litigation. For example, in *Scognamillo v. Olsen*, the defendant contended the trial court erred in allowing the plaintiffs to include punitive damages in the underlying litigation. These damages were included as a portion of their actual and compensatory damages in a subsequent legal malpractice action. The court disagreed, noting that "in a legal malpractice action based on an attorney's breach of his duty to represent his client in a prior case, it is the defendant attorney's conduct and its consequences, rather than the conduct of the client that resulted in the underlying case, which governs the analysis of damages."

While punitive damages in an underlying case may figure into compensatory damage calculations, this article addresses punitive damages in a legal malpractice proceeding.

Allowance Varies From State to State

There is a broad spectrum of how states approach whether punitive damages are allowed. Some states do not allow the recovery of punitive damages in any civil action, regardless of whether the plaintiff alleges legal malpractice.

For example, the Supreme Court of Nebraska has stated, "it has been a fundamental rule



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of law in this state that punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained.” Thus, attorneys accused of having committed malpractice in Nebraska need not worry about incurring punitive damages. Similarly in Washington, punitive damages are not allowed unless expressly authorized by the Legislature.

Alternatively, some states that permit the recovery of punitive damages in civil actions have taken steps to expressly disallow such damages in malpractice cases. For example, an Illinois statute provides that “in all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal ... malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed.”

Other states choose to allow awards of punitive damages in legal malpractice cases, but cap the amount available to plaintiffs in such a situation. Such caps may be statutorily prescribed or imposed by the application of case law.

Setting Caps on Punitive Damages

With regard to statutory caps on punitive damages in legal malpractice cases, a Texas statute provides a formula capping the amount of exemplary damages available to a plaintiff. United States Supreme Court precedent has been employed in the legal malpractice setting to describe damage caps derived from case law. In discussing excessive punitive damage awards, the Supreme Court noted that with regard to comparing compensatory and punitive damage calculations, “single-digit multipliers are more likely to comport with due process.”

The Supreme Court of Montana applied this precedent in the context of legal malpractice litigation in *Seltzer v. Morton*. There, the jury awarded \$1.1 million in total compensatory damages to plaintiff, and assessed \$20 million in punitive damages against the defendant law firm. The District Court reduced the sanction against the defendant law firm to \$9.9 million. It arrived at this figure by using the \$1.1 million compensatory damage award and the highest single-digit multiplier, nine. The Supreme Court of Montana affirmed, citing *Campbell, supra*, and stating that “a single-digit ratio, although not compulsory, is more likely to comport with due process.”

Punitive and Exemplary Damages

Punitive damages may or may not be allowed in your state. In Georgia, statute permits punitive damages: “punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant.”

In Indiana, courts have upheld the imposition of punitive damages in legal malpractice cases, as in *Bell v. Clark*. Here, Indiana’s Court of Appeals affirmed the trial court’s holding that an award of punitive damages was appropriate. The defendant attorney breached his fiduciary duty, improperly withdrew from representation, and double-billed a general partner and partnership for attorney fees. Further, an Ohio statute expressly permits the recovery of punitive damages, and Ohio courts have applied such principles in legal malpractice cases.

Although punitive damages are not recoverable in Michigan unless specifically authorized by the Legislature, exemplary damages are recoverable. Under Michigan law, exemplary damages are not punitive in nature, but serve to compensate plaintiffs for mental anguish, humiliation, and outrage.

Typically, the greater the damage awards, the more likely the tortfeasor is to be held liable for wrongdoing in



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Typically, the goal of punitive damage awards is to punish the tortfeasor and deter similar wrongdoing in the future.

In states where punitive and exemplary damages are available, all jurisdictions agree that the defendant must have acted with improper intent. Mere negligence does not justify an award of punitive damages.

For example, Indiana Courts have held that “to establish a claim for punitive damages, conduct constituting malice, fraud, gross negligence or oppressiveness inconsistent with mistake of law or fact, honest error in judgment, overzealousness, mere negligence, or other noniniquitous human failing, together with service to the public interest in such an award must be demonstrated.” Under Georgia law, “something more than the mere commission of a tort is always required for punitive damages,” as there “must be circumstances of aggravation or outrage.”

In Ohio, “punitive damages may be awarded in civil tort actions which involve ingredients of fraud, malice, or insult.” In Michigan, exemplary damages may be awarded if the plaintiff proves the defendant’s conduct was “malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiff’s rights.”

To incur punitive damages, a defendant in a legal malpractice case must be guilty of more than mere negligence; the plaintiff must prove improper intent, and damages of this type must be allowed in your state.

Conclusion

Because the burden of proof rests with the plaintiff, punitive damages as a component of recovery are not as common as other types of damages. Still, it is important to know your jurisdiction’s rule on punitive damages and the circumstances that give rise to such damage awards.

If your state permits the recovery of punitive damages in civil actions, a showing of some sort of inappropriate intent is required. In fact, such a requirement may be applicable even where punitive damages are disallowed—such as in Michigan.

Awards of punitive damages generally are not covered by professional liability insurance. As a result, your understanding of the circumstances giving rise to punitive damages—as well as local jurisdictional rules—is a vital part of defending legal malpractice cases.

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