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CRIMINAL LAW: The Erosion of the Actual Innocence Rule as a Malpractice Defense & Common Ethical Complaints

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PREFACE

There are many reasons to attribute the rise in malpractice claims by criminal law defendants, but a significant reason for this change is that the Actual Innocence Rule, historically applied as a defense for attorneys in criminal malpractice suits, has in recent cases been rejected.

This booklet is intended to familiarize the lawyer with the erosion of the Actual Innocence Rule and common ethical hazards for criminal defense attorneys.

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The Erosion of the Actual Innocence Rule as Defense to Criminal Malpractice Claims

By Chris Siebenaler & Todd Scott

Statistics show that while criminal law attorneys have historically accounted for a small percentage of all legal malpractice claims, in recent years criminal malpractice suits have increased.

Criminal malpractice, in which an attorney is accused of negligently defending his or her client in a criminal proceeding, constitutes a relatively small but increasing percentage of legal malpractice suits. The elements of criminal malpractice are nearly identical to civil malpractice; however, jurisdictions have traditionally required criminal malpractice plaintiffs to prove either attainment of post-conviction relief, or actual innocence, or both in order to successfully bring a criminal malpractice lawsuit. Although the Post-Conviction Relief rule is not facing similar scrutiny at this time, the Actual Innocence rule is losing traction as more courts adopt the view that this rule is no longer a valid defense. Criminal practitioners should be aware that jurisdictions are moving away from the innocence requirement and not depend on the Actual Innocence Rule as a protection against potential malpractice claims.

THE RULE

The Actual Innocence rule requirements present a high bar for claimants by requiring a convicted criminal to prove they were actually innocent of the charged offenses in order for the malpractice claim to be brought. The rule establishes a higher standard than mere 'legal innocence' and serves as a barrier to nearly all criminal malpractice suits. Courts adopting the Actual Innocence requirement have been motivated by public policy concerns unique to criminal practice. Principal among these concerns is that to allow a person to profit from participating in an illegal act is against public policy. Other rationales include the concern that application of this higher standard prevents a criminal defendant from shifting the responsibility for his or her conviction to another, as well as the desire to minimize frivolous litigation.

THE TREND TOWARD THE ELIMINATION OF THE RULE

The significant majority of recent Actual Innocence rule cases are moving to eliminate this requirement, declaring the rule creates an unnecessary hurdle that does not align with general principles of justice. Of the jurisdictions that have applied the Actual Innocence Rule, frivolous litigation is often cited as a primary reason. However, if mitigating frivolous lawsuits is a primary goal, mandating the Actual Innocence Rule is not an effective filter since it equally prevents potentially meritorious claims. Courts already have sanctioning power to address lawsuits with insufficient merits. Vexatious Litigant orders are specifically tailored to prevent plaintiffs from continuing to file meritless complaints and motions. Critics argue the Actual Innocence rule is an overly broad barrier to the right of competent counsel.

The Idaho Supreme Court recently addressed these issues in the Molen case:

“Actual innocence is not an element of a criminal malpractice cause of action. Requiring a criminal malpractice plaintiff to prove actual innocence is contrary to the fundamental principle that a person is presumed innocent until proven guilty beyond a reasonable doubt. Further, a criminal defendant

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can be harmed separately from the harm he or she incurs as a result of being guilty of a crime. Additionally, as a practical matter, requiring actual innocence would essentially eliminate a defense attorney's duty to provide competent counsel to a client he or she knows to be guilty."
Molen v. Christian (Idaho, 2017)

Critics also argue that courts already have available sufficient procedures to deal with frivolous litigation. Both the Kansas and Iowa Supreme Courts have agreed that preventing frivolous claims is not a sufficient reason to employ the broad Innocence Rule barrier.

In 2016, the Iowa Supreme Court determined that proof of actual innocence of the charge for which a criminal client was convicted was not a prerequisite to a claim of legal malpractice. Shortly thereafter, the Court extended that reasoning in a claim where the probationary period of a criminal claimant should have ended earlier but the attorney failed to catch a discrepancy. In *Kraklio v. Simmons* the criminal defendant Kraklio was challenging his probation, so the probation officer put him "on hold." After the challenge failed, the officer "resumed" probation and Kraklio's attorney agreed with the probation officer's resumed termination date. Ultimately, it was found that the "hold" was not supported by any law, thus defendant Kraklio should have been released from probation on his originally scheduled release date. Kraklio sued his attorney for negligently failing to catch the discrepancy. Kraklio's attorney won summary judgement on the Actual Innocence rule, but the ruling was reversed at the Court of Appeals and upheld by the Iowa Supreme Court.

While this decision still requires Kraklio to prove causation (a negligence barrier that is equally significant for a claimant to overcome) Kraklio's attorney will have likely incurred considerable costs on the defense of this matter – actual expenses and the cost incurred by the attorney in lost time while responding to a malpractice matter.

In 2014, the Supreme Court of Kansas determined that a criminal defendant who had a conviction reversed due to ineffective assistance of counsel may pursue a legal malpractice claim against his counsel without having to prove actual innocence. The Supreme Court of Kansas explained:

"The problem with the [actual innocence] rule is that a criminal defendant has a fundamental right to be proven guilty beyond a reasonable doubt grounded in the due process protections of the Fifth and Fourteenth Amendments to the United States Constitution... And if the government fails to meet that burden in a given prosecution, the defendant should go free. The right belongs to anyone charged with a crime – guilty or innocent. Furthermore, the lawyer owes the same duty to the guilty client and the innocent client. A breach of that duty by the lawyer harms the client in either case."

In the Kansas opinion, actual innocence is not the standard for conviction in a criminal action, therefore, there is no basis for it to be the standard in a civil negligence matter involving a plaintiff who was a criminal defendant.

Claims Data & Ethics Complaints in Criminal Practice

In 2016, the ABA Standing Committee on Professional Liability published a study of malpractice claims involving over 70 insurance companies throughout North America. The study revealed that 5.6% of all professional liability claims were asserted against lawyers in a criminal law practice. When compared with the previous ABA malpractice studies, the data reveals that the rate of malpractice claims against lawyers in criminal law practice has been steadily increasing since the ABA began publishing malpractice claim studies in 1985. (See Figure 1.)

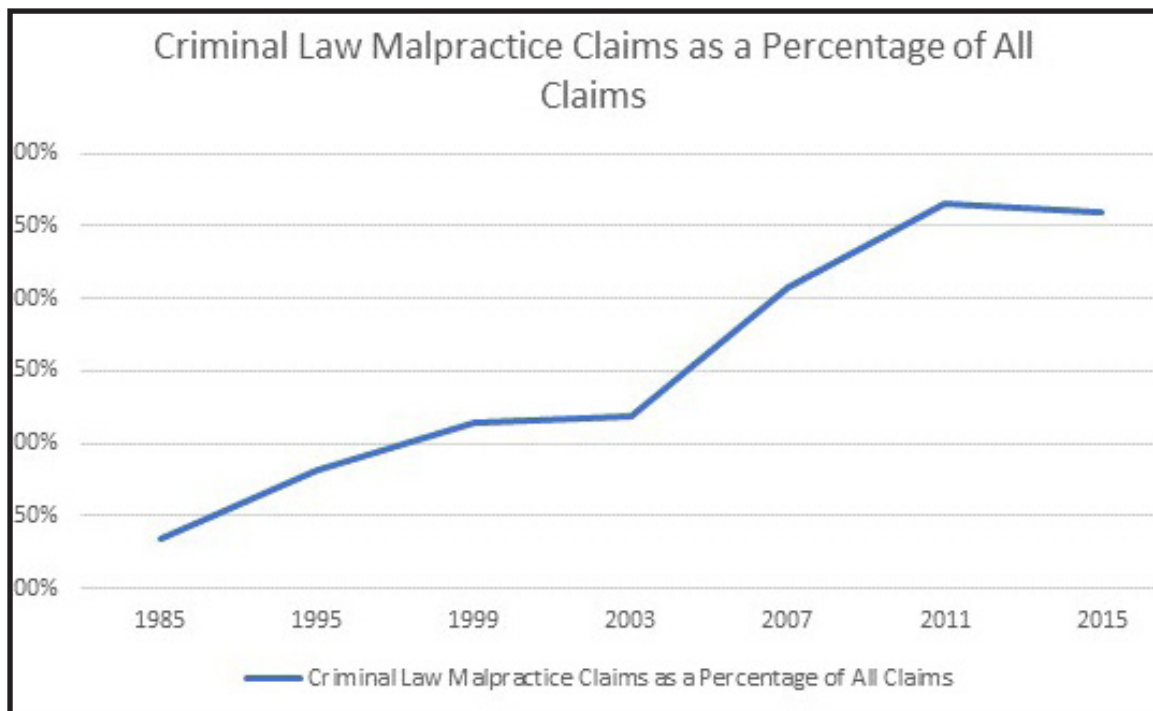


Figure 1.

The increase in the rate of negligence claims against criminal defense attorneys by their clients can be attributed to many factors. In general, society has become more litigious as consumers of legal services are more aware of professional liability issues and the availability of a damages claim if their attorney mishandled their legal matter. The standard for successfully asserting a liability claim against criminal defense attorneys has started to change as courts in many jurisdictions have determined that actual innocence is no longer a requirement to bring forth a professional liability claim against a criminal defense attorney. Additionally, the issues associated with representing criminal defendants have gotten more complex and can often expose attorneys to a higher risk of professional liability.

The Supreme Court case *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), is an example where complexities in the law – in this case, immigration law – increased the malpractice exposure for the attorney representing the criminal defendant. In *Padilla*, the court held that an attorney has an affirmative duty to address the immigration consequences facing a non-citizen defendant, and the failure to do so was the basis for a cause of action in a professional liability matter. *Padilla*,

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a U.S. military war veteran, truck driver, and a lawful permanent resident of the United States for more than 40 years, pled guilty to marijuana distribution charges. When discussing a proposed plea arrangement, Padilla's criminal defense attorney failed to advise him the plea subjected him to deportation. Additionally, the attorney advised Padilla that "he did not have to worry about immigration status since he had been in the country so long." The advice was incorrect, and Padilla's deportation was virtually automatic.

Padilla filed a pro-se motion for post-conviction relief alleging he had been given bad advice by his attorney and that he would have insisted on proceeding to trial had he known of the deportation consequence to his criminal court plea. The Supreme Court affirmed that criminal lawyers have a sixth amendment obligation to warn clients when a plea carries the risk of deportation, especially when the deportation consequences are nearly certain. Criminal lawyers' obligations are more limited when the consequences are "unclear or uncertain." *Padilla* applies retroactively, and since the statute of limitations for legal malpractice varies from state-to-state, even several years post-*Padilla* unknown immigration issues could resurface. Having a basic understanding of the immigration consequences that flow from a non-citizen's guilty plea is more important than ever.

ETHICS HAZARDS FOR CRIMINAL DEFENSE ATTORNEYS

Although allegations for professional negligence are on the rise, ethics complaints against criminal defense attorneys have always been frequent when compared to other areas of practice. Allegations of client neglect makes up a significant amount of ethics complaints alleged against attorneys in criminal practice. Also, frequently asserted against criminal defense attorneys are professional ethics claims alleging conflict of interest, mishandling evidence of a crime, and failing to follow the client's instructions.

Neglecting Client Matters

Neglect of a client matter is addressed directly in the ABA Model Rules of Professional conduct, as several the rules involving attorney client relationship address the importance of thoroughness, preparation, diligence, and promptness.

ABA Model Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Communicating With Your Clients

A lawyer must keep the client reasonably informed about their legal matter and comply with the client's reasonable requests for information. Not only is good client communication required by the rules of professional conduct, but it is simply a good practice habit that can go a long way to preventing a breakdown in the attorney client relationship. Clients often "misremember" the advice that is given to them by their attorney so informing the client in writing will

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best-serve the client and will also serve to preserve the record of what was discussed between the lawyer and client if ever there is a breakdown in the attorney-client relationship.

The ABA Model Rules specifically address the types of information that must be communicated to the client:

Rule 1.4 Communication

(a) *A lawyer shall:*

(1) *promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;*

(2) *reasonably consult with the client about the means by which the client's objectives are to be accomplished;*

(3) *keep the client reasonably informed about the status of the matter;*

(4) *promptly comply with reasonable requests for information; and*

(5) *consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.*

(b) *A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation*

Fee Disputes Between Lawyer and Client

Fee disputes between criminal defense attorneys and their clients are frequent and can lead to troubling (and sometimes baseless) allegations of ethical improprieties and malpractice. Often these breakdowns over fees can be remedied if the attorney and the client negotiate a retainer agreement that accurately reflects the realistic costs of handling the client's matter, the client's ability to pay, along with payment options that appeal to both the attorney and client. Although the rules do not require that an hourly-fee agreement between a lawyer and client be in writing, it is highly recommended that the fee arrangement be memorialized in a written fee agreement. When contracting fees with a client, here are a few other things to keep in mind:

- In almost all jurisdictions, contingent fee arrangements between a lawyer and a criminal client is considered to be unethical.
- A written fee agreement is usually required for all flat-fee arrangements.
- Non-refundable flat-fee arrangements are prohibited by the Rules of Professional Conduct in certain jurisdictions such as Minnesota, so be sure to consult with your local ethics rules regarding all fee arrangements.
- Whatever the reason for the fee dispute, the attorney cannot simply stop representing the criminal client while he or she waits for the fees to be paid.

Withdrawing From Representation

Failing to pay a lawyer's fee can be the basis for terminating client representation so long as it is done in accordance to professional and ethical rules. The ethics rules contemplate both mandatory and permissive withdrawal. Mandatory withdrawal may be necessary in some cases such as when you aware your client is perpetrating a fraud or has offered material evidence that you have come to know as false.

Rule 3.3 Candor Toward The Tribunal

(a) *A lawyer shall not knowingly:*

(3) *offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.*

ABA Model Rule 1.16: Declining or Terminating Representation addresses proper attorney withdrawal and is very specific regarding the circumstances when terminating client representation is mandatory. Part (a) addresses mandatory withdrawal:

Rule 1.16: Declining or Terminating Representation

(a) *Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:*

(1) *the representation will result in violation of the rules of professional conduct or other law;*

(2) *the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or*

(3) *the lawyer is discharged.*

The second part Rule 1.16 addresses permissive withdrawal and section (5) contemplates the client's failure to comply with an obligation to the lawyer which may include the obligation to pay the lawyer's fees:

Rule 1.16: Declining or Terminating Representation

(b) *Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:*

(1) *withdrawal can be accomplished without material adverse effect on the interests of the client;*

(2) *the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;*

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- (3) the client has used the lawyer's services to perpetrate a crime or fraud;*
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;*
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;*
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or*
- (7) other good cause for withdrawal exists.*

At all times, even when withdrawing as counsel for the criminal defendant, the lawyer must contemplate the effects the withdrawal will have on the client for the purposes of protecting the client's interest. **Rule 1.16** continues:

- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.*
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.*

Permissive withdrawal under **Rule 1.16** may also require that the attorney not reveal to the court the reason for withdrawing as the client's legal representative. If in doubt, seek guidance from local ethics authorities, or relay information to the court that you need to withdraw as a result of the requirements on **Rule 1.16**.

In Summary: Your Risk is Increasing

With a growing number of decisions determining that criminal defense attorneys can be held accountable for negligent legal services regardless of actual guilt or innocence, even in jurisdictions where actual innocence is still the standard, attorneys can no longer depend on the rule for protection against malpractice claims. Furthermore, the Actual Innocence rule does not provide protection from disciplinary complaints and proceedings. Traditionally, criminal attorneys experience a significantly lower rate of ethics complaints compared to the general population of attorneys in private practice. As new liability risks in criminal defense practice emerge, obtaining professional liability coverage is more important than ever. Defending justice is rewarding and the stakes are high when a defendant's life and liberty is in the balance. However, lawyers make mistakes. And more than ever, the cost of those mistakes in the pursuit of justice is transferred back onto the attorney.

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