



Avoiding Litigation Surprises Helps Avoid Legal Malpractice

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What advice should lawyers provide to their clients concerning the risks of filing a lawsuit before the complaint is filed? The decision in *Mireskandari v. Edwards Wildman Palmer LLP* (2022) 77 Cal. App. 5th 247, emphasizes the importance of advising a client, pre-litigation, of the downsides of moving forward with proposed litigation. Particularly in California, when litigating against a publisher, such advice arguably should include the risk of an anti-SLAPP motion, the possibility of dismissal, and resulting liability for related attorney's fees, including legal fees incurred by the opposing party. Although the *Mireskandari* case involved other issues as well, this article focuses on the appellate court's reversal of the defendants' summary adjudication motion, premised on the plaintiff's argument that if he had been advised of the risks of filing his complaint in California under the anti-SLAPP statute, he never would have gone forward with the litigation in the first place.

The plaintiff a former solicitor in the United Kingdom, alleged professional negligence, breach of fiduciary duty and breach of contract against the lawyers who represented him, claiming they failed to advise him of the anti-SLAPP statute before he filed a complaint against a newspaper publisher, the *Daily Mail*, a London tabloid that had published a series of negative articles that resulted in disciplinary action against plaintiff. When the publisher filed successive anti-SLAPP motions, the plaintiff incurred legal fees in the amount of \$262,000.

After filing the complaint, defendants did advise plaintiff that an anti-SLAPP motion was likely, but allegedly did not tell plaintiff that if the court granted the anti-SLAPP motion, plaintiff could lose his case at the pleading stage, and would be liable for the publisher's legal fees, and that even if plaintiff prevailed, an appeal could delay the plaintiff's case and significantly increase the expense of the litigation. Plaintiff also alleged that he was not told that he could have filed the case in another jurisdiction where California's anti-SLAPP statute did not apply.

At the trial court level, defendants won summary adjudication because the court found that plaintiff could not demonstrate under the "case-within-a-case method" that plaintiff would have prevailed against the publisher absent the alleged negligence of plaintiff's lawyers. On appeal, the court determined this was error, holding that the lawyers representing plaintiff owed a duty of care to advise plaintiff of the foreseeable risks of filing the litigation before filing the action. *Id.* at 423. The court found that plaintiff stated a viable claim by alleging that, but for the negligence of defendants in failing to advise of the downsides of filing the complaint, including the foreseeable anti-SLAPP motion and related fees incurred in the anti-SLAPP litigation and the risk of losing the motion, plaintiff would not have filed the lawsuit in California, and would have avoided the damages he incurred in litigating the anti-SLAPP motion.

The appellate court interpreted the requirement that a plaintiff alleging legal malpractice in litigation demonstrate that he would have obtained a more favorable judgment. But, the court held that the “case-within-a-case” method described in *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241, was but one way by which a plaintiff established causation in a litigation malpractice case and was not a “blanket method” of establishing causation. *Id.* at 419. The crucial inquiry, the court said, is “what would have happened if the defendant attorney had not been negligent.” *Id.* The court held that plaintiff Mireskandari’s allegations that he would have avoided significant expenses met this test.

The appellate court indicated that along with a duty to investigate in order to know whether a client has a legal claim, a lawyer has a duty to evaluate the likelihood of success so the client can decide whether or not to assert the claim. *Id.*, citing *Takhar v. People ex rel. Feather River Air Quality Management Dist.* (2018) 27 Cal.App.5th 15, 28-29. Along with this duty “comes an attorney’s duty to evaluate and advise clients of the risks of contemplated litigation.” *Mireskandari*, at 419. The court cited *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, in which plaintiff seeking approximately \$18,000, lost the case and ended up with liability for \$580,000 in attorneys’ fees for the opposing party under a fee shifting provision. Similarly, the court cited *E-Pass Technologies, Inc. v. Moses & Singer, LLP* (2010) 189 Cal.App.4th 1140, 1150, in which the court held that the legal malpractice plaintiff was “damaged by pursuing litigation that defendants in the exercise of reasonable care, should have advised it not to pursue.” In such scenarios, a legal malpractice plaintiff need not prove he would have been successful in the underlying litigation, but may show that, given the foreseeable risks involved, he would not have pursued the litigation. In showing what would have happened but for the defendant lawyer’s negligence, a plaintiff may show he would never have filed the litigation and would be better off as a result. The court held that plaintiff Mireskandari had stated a viable claim for professional negligence. *Mireskandari*, at 423.

Lawyers have an ethical obligation to explain matters to the client to the extent reasonably necessary to permit the client to make informed decisions about the representation. Cal. Rules of Prof. Conduct, rule 1.4(b). As the *Mireskandari* decision illustrates, pre-filing evaluation of foreseeable litigation consequences is the foundation for solid advice to clients about the risks of litigation. *Mireskandari* recognizes that attorneys may have liability for failing to advise a client not to file a lawsuit. Lawyers cannot collect “fees for pursuing litigation without regard to whether that litigation is likely to be successful.” *Id.* at 421. As the decision illustrates, foreseeable consequences to a client can include an award of the opposing party’s fees based on statutory fee shifting provisions. Clients should also be advised of other fee shifting provisions, such as provisions in CC&Rs as discussed by the *Charnay* decision. Exposure to fee shifting based on contractual provisions is also often foreseeable. Such foreseeable consequences may also include exposure for attorneys’ fees incurred in pursuing frivolous litigation, as illustrated by the *E-Pass* decision. Ultimately, the court’s message is that attorneys have a wider obligation to exercise due care to protect a client’s best interests in all ethical ways and in all circumstances.”

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