Establishing Causation and Damages In Transactional Malpractice Cases after *Viner v. Sweet*

By Scott H. Carr

A prospective client walks into your office and tells you that his transactional lawyer failed to dot the i's and cross the t's on important transactional documents. The prospective client goes on to share that he believes he lost millions of dollars as a result of the lawyer's malpractice. While such facts alone may cause many lawyers to agree without further discussion to take the case, the smart practitioner would conduct further inquiry on what is oftentimes the most pivotal issue in these types of actions – causation. Unfortunately, all too often, causation is substantially ignored in both case selection and case preparation of a transactional legal malpractice matter. To ignore this key element at either stage would be a mistake.

As most practitioners who have handled litigation malpractice cases are aware, the elements which must be proven are duty, breach, causation and damages. Causation has typically been referred to in these circumstances as the "case within a case" method of causation due to the fact that in the litigation malpractice context, you must prove that the client would have won or done better in the underlying litigation matter in which the alleged malpractice was committed. Until recently, many lawyers viewed the causation element in transactional malpractice cases as substantially different. There was a split of authority as to whether transactional malpractice cases were subject to the "but-for" standard of causation or the "substantial factor" standard of causation which is typical in most negligence cases. That issue was decided by the California Supreme Court in *Viner v. Sweet* (2003) 30 Cal.4th 1232.

In *Viner* (pronounced "veener"), the court determined that "just as in litigation malpractice actions, a plaintiff in a transactional malpractice action must show that but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Id.* at 1054.) The rationale for this is that there is little distinction between a transactional malpractice case and a litigation malpractice case. As the court notes, "determining causation always requires evaluation of hypothetical situations concerning what might have happened, but did not. In both litigation and transactional malpractice cases, the crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent. This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative." (*Id.* at 1242, citations omitted.)

Since *Viner* is the seminal case in transactional malpractice cases, you would think that all attorneys, whether representing plaintiffs or defendants in legal malpractice cases, would follow the dictates of *Viner* and prepare their cases accordingly. Not so. Since the Supreme Court's pronouncement in *Viner*, many defendants raise arguments which either twist the language of the *Viner* decision, or completely ignore it. Some of these myriad issues which the plaintiff's lawyer might encounter are summarized below.

1. "In a transactional malpractice case, causation cannot be proven without testimony from the other party to the transaction that he would have agreed to terms more favorable to the plaintiff"

This argument, which is raised by many legal malpractice defendants, is directly addressed in the *Viner* decision. As the court states, "in transactional malpractice cases, as in other cases, the plaintiff may use circumstantial evidence to satisfy his or her burden. An express concession by the other parties to the negotiation that they would have accepted other or additional terms is not necessary." (*Id.* at 1242, 1243.) Thus, the existence of other circumstantial evidence, including but not limited to statements or conduct by the other parties in the negotiation, documentary evidence, expert testimony, and/or other indirect evidence will suffice to satisfy the causation burden in the absence of a direct concession by the other party to the transaction.

2. "Plaintiffs must prove their damages to a 'legal certainty'"

This argument *du jour* for defendants in legal malpractice cases is often accompanied by an argument or at least some innuendo implying that as a result of the "legal certainty" language taken from cases such as *Bernard v. Langer* (2003) 109 Cal.App.4th 1453, plaintiff's burden of proof at trial as to the causation and damages is something greater than a preponderance of the evidence. Such an argument has no basis in law or fact, and is clearly contradicted by legal authority.

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As *Viner* makes clear, "the plaintiff need not prove causation with absolute certainty. Rather, the plaintiff need only introduce evidence which affords a reasonable basis for the conclusion that it is *more likely than not* that the conduct of the defendant was a cause in fact of the result." (*Viner* at 1243, emphasis added.) Defendants often seem to confuse the fact of damage with the amount of damages suffered. "Where the fact of damages is certain, the amount of damages need not be calculated with absolute certainty ... the law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation...." (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 873; *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, ,456-458; *DuBarry Int. v. Southwest Forest Industries* (1991) 231 Cal.App.3d 552, 562.) This rule applies in the context of legal malpractice actions. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 744 ["the loss or diminution of a right or remedy constitutes injury or damage..."].) Neither uncertainty of amount nor difficulty of proof renders that injury speculative or inchoate. (*Ibid.*) The law only requires that some reasonable basis of computation be used, and will allow damages so computed even if the result reached is only an approximation. (*Distribudor, Inc. v. Karavanis* (1970) 11 Cal.App.3d 463, 470.) "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created...." (*Id.*, citations omitted.)

3. "Damages are speculative because the events upon which the claim for damages is based never occurred"

This argument is often raised in transactional malpractice cases because in many cases the plaintiff's ability to move forward in the transaction in the manner that was originally envisioned was thwarted by the malpractice of the lawyer. For example, a lawyer is hired by the owners of a company to document the sale of that company to a third party. A portion of the sale price is paid in notes or some other future obligation. In preparing the transactional documents, the lawyer fails to include reasonable security provisions requested by the client to protect them in the event of a default on those future obligations. Several months later, the purchasing company defaults on its obligations to the seller and the seller, as a result of the malpractice of the lawyer, lacks adequate recourse. The seller claims that had it known that the transactional documentation lacked the security provisions in question, it would not have sold its company to the purchaser and instead would have sold it to another third party at a substantial profit even though it could not identify the specific third party. Many defendants would argue that the damages sustained by the plaintiffs under such a scenario would be speculative. However, the mere fact that the future event (i.e. the subsequent resale of the company) never occurred, does not mean that the damages flowing from the malpractice are

speculative. In fact, as previously pointed out, the *Viner* court makes clear that "determining causation *always* requires a valuation of hypothetical situations concerning what might have happened, but did not. In both litigation and transactional malpractice cases, the crucial causation inquiry is what would have happened if the defendant attorney had not been negligent. This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative." (*Id.* at 1242, emphasis added.)

Under these circumstances, defendants do not escape liability merely because the effort of reconstructing what would have happened is complex or difficult. If plaintiff has evidence, any evidence, which affords a reasonable basis for the conclusion that more likely than not defendants caused damage, the plaintiffs have carried their burden. Thereafter, it is the defendant's burden to prove that there is absolutely no reasonable basis for the damages which plaintiff seeks.

4. "A plaintiff is prohibited from presenting evidence that he would not have done a certain deal or participated in a certain transaction but for the lawyer's negligence"

Once again, while this is a common argument raised in transactional malpractice cases, it is directly rebutted by the holding in *Viner*. As *Viner* makes clear, plaintiff is *required* to prove but-for causation. However, plaintiff is entitled to demonstrate such causation through any number of means or scenarios. "The requirement that the plaintiff prove causation should not be confused with the method or means of doing so. Phrases such as 'trial within a trial,' 'case within a case,' 'no deal' scenario, and 'better deal' scenario describe methods of proving causation, not the causation requirement itself or the test for determining whether causation has been established." (*Viner*, at 1240, fn 4.) Thus, a plaintiff can proceed on any number of theories, if sufficient evidence exists to support those theories including the theory that but for the attorney's negligence, he would not have done the deal at all. Using the example above, if the plaintiff can prove that he would have sold the company to someone else for more money had the defendant lawyer not committed malpractice, then he would be entitled to prevail under the "better deal" scenario. Conversely, if the plaintiff were to prove that he would not have done the deal had he known that the term in question would not have been accepted by the buyer, then he can proceed under the "no deal" scenario. Both of these are merely simple methods of proving but-for causation.

5. "The 'underlying case' or 'case within a case' should be bifurcated and tried first prior to liability or damages"

Increasingly, legal malpractice defendants are seeking to bifurcate the issue of causation from the issues of liability and damages. The reason that they do this is to seek to shield the lawyer's offensive conduct from the jury for as long as possible while trying the underlying matter first. Not only does such procedure tend to confuse and mislead the jury, but it is directly prohibited by existing California law. The analysis of this issue begins and ends with *Cook v. Superior Court* (1971) 19 Cal.App.3d 832. The *Cook* court not only determined that the court had *no discretion* to try the causation element first in a legal malpractice action, but the court was in fact specifically prohibited from doing so.

Cook was a legal malpractice case based upon the failure of the attorneys to timely bring to trial a medical malpractice action. The lower court issued an order allowing a bifurcation that would try the underlying matter, or medical malpractice issue first, prior to issues of liability and damages. In prohibiting such a bifurcation, the appellate court began by reiterating that causation is a necessary and essential element of the liability and damages claims. As stated in *Cook*: "Thus the issue of liability includes not only a showing the attorney was negligent but also a showing his negligence caused damage. Factors of damage essential to proof of the issue of liability against the attorney would also be factors essential to proof on the issue of damages. Thus, where the trial of the question of liability is bifurcated by requiring a trial of the issues respecting medical malpractice before a trial of the issues of legal malpractice the court, in substance, is directing a trial of some of the issues on the question of damage before a trial on some of the issues on the question of liability." (*Id.* at 834.) In further finding that the bifurcation of the "case within a case" would exceed the court's authority, the court concluded: "The authority of the court to bifurcate a trial of the issues in a case is conferred and limited by the provisions of Code of Civil Procedure section 598. The statute does not authorize the court to order the trial of a part of the issue of liability and a part of the issue of damages before the trial of another part of the issue of liability." (*Id.* at 834.) Consequently, *Cook* makes clear that such a bifurcation would be unusual and unprecedented.

While a plaintiff can certainly stipulate to such a form of bifurcation, it would rarely be in a plaintiff's best interest to delay the presentation of evidence regarding the defendant's malpractice until after causation has been established.

These are just some of the issues which arise relating to causation in transactional malpractice cases. While each case needs to be evaluated, prepared and tried based upon its specific facts and circumstances, it is imperative that issues related to causation be fully considered, vetted and investigated prior to undertaking the representation of a client in transactional malpractice cases. ■