

NOT ACTUAL PROTECTION: ACTUAL INNOCENCE STANDARD FOR CRIMINAL DEFENSE ATTORNEYS IN CALIFORNIA DOES NOT ELIMINATE ACTUAL LAWSUITS AND ACTUAL PAYMENTS

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In 1998 the California Supreme Court decided *Wiley v. County of San Diego* and adopted the “actual innocence” standard for plaintiffs who sue their defense attorneys for criminal malpractice. However, attorneys specializing in criminal defense work are mistaken if they depend solely on *Wiley* for protection against malpractice claims. The actual innocence standard is inapplicable to many of the types of cases filed against criminal defense attorneys. Even if actual innocence is a potential defense, thousands of dollars in defense costs will be spent establishing this defense. Attorneys who decline professional liability coverage based upon an actual innocence defense will find they are paying actual dollars (and a lot of them) to defeat a legal malpractice claim. Recently on July 2, 2001 the California Supreme Court handed down its decision in *Coscia v. McKenna & Cuneo* which answered the question what constitutes actual innocence? The Supreme Court held in *Coscia* that post conviction exoneration is a prerequisite to prevailing in a legal malpractice claim arising out of a criminal proceeding. While this ruling may be viewed by many as establishing a stringent element of proof in a legal malpractice claim, the case may have the unintended consequence of increasing malpractice claims against criminal defense attorneys.

I. The Wiley Standard

In *Wiley* the California Supreme Court adopted the actual innocence standard in criminal malpractice cases. The Court held that when a criminal defendant sues his defense attorney for legal malpractice, actual innocence is a necessary element of the cause of action. This means that plaintiffs in the criminal malpractice context must prove by a preponderance of the evidence that they did not commit the crime for which they were convicted. The background facts are simple. In 1990 Kelvin Wiley was charged with assault and battery. He was appointed a public defender. Wiley was convicted of battery and sentenced to four years in prison. He filed a writ of habeas corpus alleging that his defense attorney did not conduct an adequate investigation to confirm his alibi and that a prosecution witness had lied under oath. The court determined that the defense counsel’s inadequate investigation had deprived Wiley of exculpatory witnesses. The prosecutor later dismissed the case.

Wiley then filed a legal malpractice action against his defense attorney and the County of San Diego. The trial court refused to submit to the jury the question of Wiley’s innocence. The jury found in favor of Wiley and awarded damages of \$162,500. The

Court of Appeals reversed the trial court's ruling for Wiley on evidentiary issues, but declined to adopt the actual innocence standard.

The California Supreme Court affirmed the Court of Appeal's judgment but went one step further and adopted the actual innocence standard for California. The Wiley Court based its ruling on public policy and the distinction between criminal and civil procedure.

As for public policy, the Court noted that a guilty defendant's conviction is the direct consequence of his own actions regardless of his attorney's negligence. Allowing a guilty defendant to benefit from his attorney's negligence serves to "shift responsibility for the crime away from the convict" to the attorney. The Court stated that however negligent a plaintiff's attorney might have been, that harm is superseded by the greater culpability of the plaintiff's criminal conduct.

The Court also distinguished between criminal and civil malpractice actions. In the civil context the focus is solely on the attorney's alleged error. The plaintiff's conduct is irrelevant. Thus, a civil malpractice plaintiff can argue that "but for" his attorney's negligence he or she would not have been found liable. In the criminal malpractice context, however, any harm suffered by the plaintiff "is not 'only because of' the attorney error but principally due to the client's antecedent criminality."

By way of remedies, the Court noted that in instances of criminal defense attorney negligence, constitutionally protected post-conviction relief is available in the criminal justice system to provide what competent representation should have afforded in the first place: dismissal of charges, a reduced sentence, an advantageous plea bargain or a new trial. In contrast, a civil matter lost through an attorney's negligence is lost forever.

II. Malpractice Protection Provided by Wiley

Defense attorneys should not assume that Wiley's actual innocence standard insulates them from criminal malpractice lawsuits. Attorneys making that assumption may be tempted to abandon malpractice coverage. This would be a dangerous and expensive assumption. There are several situations in which Wiley's actual innocence standard is either unclear or does not apply.

For example, many criminal defense attorneys handle civil matters which can be a source of significant claims against them and for which Wiley offers no protection. In 1995 a plaintiff was arrested for and later convicted of several traffic violations. She was upset with the police officer investigating the case and created a web site which contained personally embarrassing and untrue statements about the officer. A criminal defense attorney represented the police officer in an action to shut down the web site and obtain damages for defamation. The plaintiff sued the attorney in 2000 for abuse of process, malice, libel and extortion. The case has been averaging approximately \$1,000 per month in defense costs.

Even where a criminal defense lawyer is engaged in criminal defense work and his client pleads guilty, allegations may be made against him which do not permit a defense based on Wiley. In 1999 a lawyer represented a client charged with sexually abusing a minor. The attorney became involved with his client and was charged with paying off a witness to flee the jurisdiction to avoid testifying against his client. The client then agreed, without the lawyer's knowledge, to plead guilty to reduced charges in exchange for testifying against the lawyer's alleged misconduct with regards to the witness. The client later sued the attorney for breach of fiduciary duty and for allowing the client to deceive law enforcement officials. The gravamen of the complaint was not legal malpractice and the Wiley case offered no protection. Defense costs are in excess of \$30,000 and a trial is scheduled.

It is important to note that the defendant attorney will have to pay defense costs regardless of whether the plaintiff ultimately meets his burden of proving actual innocence. Establishing this defense can cost substantial time and money.

In 1999 a man was arrested for stealing electronic equipment from a store in California. His criminal defense attorney ultimately recommended a guilty plea. The client agreed but later changed his mind, fired his attorney and hired a new attorney. In the interim, the police lost the stolen equipment and all charges against the client were dismissed. He then sued his first attorney claiming that the attorney had not properly prepared his case and that he accepted the guilty plea because the lawyer was unprepared for trial. Was the client actually innocent? The plaintiff said yes; the charges were dismissed, but there was no finding of acquittal. Before this key question could be answered, the case settled for \$25,000 plus \$35,000 in defense fees.

III. Clarifying Wiley: Coscia Defines Actual Innocence

On July 2, 2001 the California Supreme Court decided *Coscia v. McKenna & Cuneo*. The plaintiff Nicholas Coscia was indicted for securities fraud and related offenses. He was defended by McKenna & Cuneo and Juantia Brooks. In 1993 Coscia pleaded guilty to one federal count of conspiracy to violate federal securities law. He admitted his guilt under oath and advised the sentencing judge that his plea was made knowingly and voluntarily. He was fined and placed on probation. In 1994 Coscia filed a legal malpractice lawsuit against McKenna & Cuneo claiming that he sustained damages because of the firm's negligent legal advice. The California Superior Court dismissed plaintiff's lawsuit on grounds that his criminal conviction constituted collateral estoppel and precluded relief. The California Court of Appeal reversed the Superior Court. The Court of Appeal acknowledged that the majority rule in criminal malpractice actions require that the underlying conviction be set aside. However, the Court of Appeal found that despite the public policy supporting the majority rule, its adoption in California would render most malpractice lawsuits time barred. The California Supreme Court reversed the Court of Appeal, holding that an individual convicted of a criminal offense must obtain reversal of the conviction, or other exoneration by post conviction relief, in order to establish actual innocence in a criminal malpractice action. The Court recognized the dilemma posed by its ruling because the statute of limitations could expire in a

malpractice claim before a plaintiff obtained the requisite post conviction relief. Under California law, a malpractice action must be brought within one year after the plaintiff discovers or should have discovered the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. The Court in *Coscia* declined to accept the view that a plaintiff did not suffer harm until his conviction has been reversed by post conviction relief. Instead, the Supreme Court ruled that a plaintiff must still file a criminal malpractice action within the "one or four" year statutory period. The court may then stay the malpractice action during the period the "plaintiff timely and diligently pursues post conviction relief." The *Coscia* court considered this solution the best of all worlds: the plaintiff's malpractice claim is not barred by the statute of limitations; the defense attorney is not threatened by stale claims; and post conviction exoneration remains an element of proof.

IV. Will *Coscia* Result In Increased Legal Malpractice Filings?

Despite its good intentions, *Coscia* may lead to an increase in legal malpractice filings: criminal defendants must file a claim within the limitations period in order to preserve their cause of action. A plaintiff now knows that the court may stay his malpractice claim while the post conviction exoneration proceedings grind on. Following *Coscia*, criminal defendants have nothing to lose by filing malpractice claims within the statutory period and indeed, are compelled by the statute of limitations to file malpractice actions before they know for certain that the essential element of post conviction exoneration even exists.

Regarding the stay, the California Supreme Court acknowledged that years or even decades may elapse before the wrongfully convicted criminal defendant obtains post conviction relief. Under these circumstances, California courts confronted with criminal malpractice lawsuits have two options:

1. stay the entire malpractice action after the initial pleadings are filed or
2. allow the discovery process to proceed because an extended stay will jeopardize the availability of witnesses, test witnesses' memories and increase the risk of lost or stale evidence.

Even more burdensome, if courts adopt the second approach, the defendant attorney will be forced to engage in the discovery process years before the malpractice action is ready for trial, without knowing whether plaintiff can even establish actual innocence at the end of the day. Moreover, the defense attorney will have fewer opportunities to seek summary disposition of the lawsuit because a decisive element of plaintiff's cause of action – actual innocence - may not be established until extensive and expensive discovery is concluded. Lastly, it should be noted that in *Coscia*, the plaintiff entered a guilty plea and then sued his attorneys for malpractice. The California Supreme Court eventually remanded his case to the trial court to permit the plaintiff to amend his complaint and allege actual innocence in compliance with *Wiley*. By its actions, the court did not consider it impossible to at least plead post conviction exoneration even in the face of a knowing and voluntary guilty plea. In its opinion, the Court expressly refused to distinguish between defendants whose convictions are based upon guilty pleas and those

whose convictions result from trials for purposes of pleading and proving post conviction exoneration.

Under California law, a guilty plea is admissible in subsequent civil actions as an admission but is not conclusive because the issue of guilt was not fully litigated in the criminal proceeding. This principle recognizes that a defendant may plead guilty for many reasons including the avoidance of prosecution, the expense of defense counsel and adverse publicity for the defendant and his family. Thus, criminal defense attorneys should be careful not to rely on guilty pleas as failsafe protection against his client's ability to eventually establish exoneration.

V. Conclusion

Attorneys who specialize in criminal defense work in California should not depend on the Wiley ruling and its extension under Coscia for protection against malpractice claims. It would be a mistake to substitute Wiley for professional liability coverage on the belief that the "actual innocence" standard provides sufficient protection because:

1. Criminal defense attorneys in malpractice claims must still pay defense costs.
2. Even a criminal defendant's guilty plea does not prevent that defendant from attempting to prove his actual innocence.
3. Following Coscia, criminal malpractice actions will more often than not be filed before the post conviction exoneration element is established. It is likely that expensive discovery will be conducted pending resolution of the post conviction relief petition because delays in discovery may be viewed as too prejudicial to the plaintiff.
4. Actual innocence has not been judicially tested in California and may not develop as many believe it would under Coscia.
5. The actual innocence standard will not protect a attorney charged with malpractice in a civil case or against allegations irrelevant to criminal defense such as defamation.

Attorneys practicing criminal law in California must take heed. The actual innocence standard in Wiley and Coscia does not mean the end to malpractice lawsuits and indeed filings may increase precisely because of these two decisions.

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