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Juan C. Araneda

Jennifer A. Becker

David Borovsky

Robert J. Buccieri

Chip Cox

Kim O. Dincel

Kathleen Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

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Steven Sharafian

John B. Sullivan

Jennifer W. Suzuki

Jeanette Traverso

Beth A. Trittipio

Karen L. Uno

Kevin Whittaker

Irene K. Yesowitch

CRIMINAL LEGAL MALPRACTICE

California Law

By Jennifer A. Becker

Rose v. Hudson (2007) 153 Cal. App. 4th 641

The Third District holds that the legal malpractice statute of limitations applies to a criminal malpractice claim initiated over a decade after the legal services were rendered, despite a delay in obtaining post-conviction relief

Pete Rose sued Harry E. Hudson, Jr. for criminal legal malpractice for services rendered in 1994 through mid-1996. He did not obtain post-conviction relief until October 2004, and he filed his complaint in 2005. The trial court sustained a demurrer without leave to amend on statute of limitations grounds.

In *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194 [PL Update 105] the Supreme Court held that in a criminal legal malpractice action a plaintiff must obtain post conviction relief in the form of a final disposition of the underlying criminal case. A wrongful act or omission giving rise to a criminal malpractice action necessarily occurs during the course of the attorney's representation of the client and the criminal conviction constitutes actual injury within the meaning of the legal malpractice statute of limitations, C.C.P. § 340.6. If the Plaintiff is forced to initiate a legal malpractice action prior to obtaining post conviction relief, the trial court should stay the malpractice suit. In this way a Plaintiff's claim will not be

barred prematurely and defendant attorneys will receive timely notice of a claim.

In Rose's action actual injury occurred in November 1995 when he was convicted. He knew he was claiming attorney negligence no later than November 1996, when a new attorney filed an appellate brief arguing ineffective assistance counsel. Even factoring a two year tolling due to Rose's incarceration, his complaint had to be filed by November 1999, and the 2005 complaint was too late.

The Court rejected the argument that the retroactive application of *Coscia* violated due process. Judicial decisions are generally applied retroactively. There are two exceptions: where there are substantial concerns about the effects of a newly articulated rule on the general administration of justice, or where it would unfairly undermine the reasonable reliance of parties on the previously existing state of the law. A court decision does not announce a new rule

of law if it does not overrule or disagree with any unanimous and unquestioned body of California decisional authority. *Coscia* did not overrule or disagree with any California decisional authority, and Rose could not have reasonably relied on prior authority.

Rose argued that statutes of limitations generally begin to run upon the occurrence of the last element essential to the cause of action. Since actual innocence is a necessary element of criminal malpractice, he reasonably believed that his action accrued when the judgment of exoneration was entered. *Coscia* created a new rule because it held for the first time that a criminal malpractice plaintiff couldn't wait to satisfy the elements of the cause of action are satisfied. The Court disagreed noting that the element of actual innocence should not be confused with the exoneration evidence to prove it. An exoneration order is the only way to prove actual innocence, it is not an element of the cause of action.

Nor was the fact that Rose's innocence was established by a new scientific technique sufficient to excuse him from the general rules. Although *Coscia* noted that "exceptional circumstances" may afford a Plaintiff to establish actual innocence in the malpractice action, *Coscia* was referring to procedural issues.

The court also rejected an equitable tolling argument, noting that equitable tolling is specifically precluded by § 340.6.

Nor would the Court of Appeal allow Rose leave to amend his complaint to plead tolling under § 340.6 which allows tolling where the "plaintiff is under a

legal or physical disability which restricts the plaintiff's ability to commence legal action." Rose argued he would have suffered reprisals at the hands of other prisoners had he filed his complaint while he was in prison. Since this is a common consequence of incarceration the allegations would invoke the specific tolling rule of C.C.P. § 352.1, which limits tolling for incarceration to two years.

Comment: Courts continue to strictly apply rules that hinder criminal legal malpractice claims.

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