

PROFESSIONAL LIABILITY UPDATE

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CRIMINAL LEGAL MALPRACTICE

CALIFORNIA LAW

By Jennifer A. Becker

**Brooks v. Shemaria** (2006) 144 Cal.App.4th 434

*The Second District holds that the criminal legal malpractice actual innocence requirement does not apply to fee disputes or other proceedings not involving the culpability of the Plaintiff for a crime.*

John Brooks retained Joseph Shemaria to defend him in a criminal matter relating to drug charges. Shemaria requested a \$50,000 retainer to cover the cost of representation through trial and to seek the return of seized property. Brooks did not have time to review the retainer agreement before he signed it due to an emergency lockdown at the jail. The written agreement did not state that the unused portion of the retainer would be returned to Brooks, but Shemaria later orally agreed to that provision.

Brooks pled no contest to the drug charges and the court ordered return of his personal property and destruction of some firearms. Shemaria did not appear at a hearing to reconsider the order to destroy the firearms. When no one ever picked up the property that had been ordered returned, it was destroyed.

Brooks sued Shemaria for breach of contract, rescission, and professional negligence. Brooks alleged that Shemaria refused to refund unused

portions of the retainer and failed to exercise reasonable diligence and competence in seeking the return of Brooks' seized property.

The trial court granted Shemaria's motion for summary judgment based on the failure of Brooks to establish his actual innocence in the criminal matter.

The Court of Appeal agreed that the actual innocence requirement does not apply to the claim for the refund of unused portions of the \$50,000 retainer. In general establishing actual innocence by reversal of the conviction or other post-conviction exoneration is an element of a criminal legal malpractice case. However a fee dispute is not a malpractice action because competent representation is not the primary right at issue.

The Court of Appeal also decided that the actual innocence requirement did not apply to Brooks' claim that Shemaria failed to exercise reasonable competence and diligence in seeking the return of

Brooks's seized property. The policy reasons behind the actual innocence requirement preclude a guilty defendant from profiting from his or her own wrong; to preclude guilty defendants from shifting their punishment to their former attorneys; and to recognize that a defendant's own criminal act remains the ultimate source of his predicament. In addition, a guilty defendant who is convicted or given a longer sentence as a result of counsel's incompetence can obtain post-conviction relief on that basis but this is not available for client losses in civil matters. Criminal malpractice cases present formidable practical problems such as quantifying damages and the complexity of the standard of proof.

Brooks did not seek to profit from his own wrong even though he committed a crime. He lost property that he owned regardless of his criminal activity. Brooks did not seek to shift his own responsibility for the crime to Shemaria by seeking damages for his property that the court and the sheriff determined should have been returned, presumably because there was not connection with the crime. There is no form of post-conviction redress for the wrongs Brooks alleges. The claim did not raise the practical problems discussed above.

*Comment:* The actual innocence requirement is a difficult obstacle to a criminal legal malpractice claim. Courts will not construe this additional requirement to apply to claims against attorneys that are unrelated to the criminal proceeding.