# The Blame Game in Legal Malpractice

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> "I've done enough wrong on my own, I don't want to get blamed for something I didn't do." – Dwight Gooden

If you hear the name Marie Antoinette, you probably think of the famous saying attributed to her, "let them eat cake." The quote captures the callousness of the royal family and their obliviousness to the conditions of ordinary people. Yet, there is no contemporary historical evidence that Marie Antoinette ever said anything like, "let them eat cake" (or "let them eat brioche" to be more accurate). The first time that the saying was attributed to her was fifty years after her death. Moreover, there are similar folk tales in other cultures such as the 16th-century German tale of the noble-woman who wondered why the hungry poor don't simply eat *Krosem*, a sweet bread. In short, while Marie Antoinette likely had many shortcomings, saying "let them eat cake" was not one of them.

In the legal malpractice world, it is common for attorneys to get blamed for the inactions of another attorney. However, unlike Marie Antoinette, attorneys have an opportunity in appropriate cases to correct the record and show that successor counsel had an opportunity to remedy any alleged malpractice.

## Michigan Cases

The seminal Michigan case for this proposition is *Boyle v Odette*, 168 Mich App 737; 425 NW2d 472 (1988). In *Boyle*, the plaintiff believed that the defendant attorney failed to timely file suit against the host of a wedding reception, who allegedly furnished alcoholic beverages to an underage guest involved in a traffic accident that injured her. The Court held that the defendant attorney "cannot be held liable for failing to file a social-host action prior to expiration of the period of limitation where he ceased to represent plaintiff and was replaced by other counsel before the statutory period ran on her underlying action."

This rule applies to allegations other than a missed statute of limitations. For example, in *Melody Farms, Inc v Carson Fischer, PLC*, 2001 WL 740575, unpublished opinion *per curiam* of the Michigan Court of Appeals, issued 2/16/01 (Docket No. 215883), the Court applied these rules to a legal malpractice allegation that the defendant attorneys did not conduct sufficient discovery during the underlying litigation. Because the defendant attorneys were replaced by successor counsel four months before the discovery cutoff and a year before trial, the Court held as a matter of law that the alleged failure to conduct discovery could not be the proximate cause of the plaintiffs' asserted damages. See also *Laymon v Keckley*, 696 F Supp 299 (WD Mich, 1988) ("[a]t the time the defendants withdrew as counsel, plaintiffs' interests were adequately protected").


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## Law of Other Jurisdictions

The same rule applies in other jurisdictions. In *Filbin v Fitzgerald*, 211 Cal App 4th 154, 171; 149 Cal Rptr 3d 422 (Cal App, 2012), the plaintiffs discharged their attorney in the underlying case shortly before trial due to a disagreement over the amount of a settlement demand. The underlying case settled two and a half months after the plaintiffs retained successor counsel. The subsequent legal malpractice case was brought on the theory that the defendant attorneys had misstated the law regarding the maximum amount required in a settlement demand. The Court dismissed the legal malpractice case, holding that the outcome of the underlying litigation was in the plaintiffs' own hands once the defendant attorneys were replaced:

> Therefore, when replacement counsel took over the case on August 3, it was with no lingering impairment at [defendant attorneys'] hands. When it came time for the [plaintiffs] to consider whether to settle the case some two and a half months later, in mid-October, they were free agents. No past decision by [defendant attorneys] hobbled them. Nothing prevented their new counsel from giving them impartial advice. No one would stop them from going to trial. Their decision to settle was theirs and theirs alone, made with the assistance of new counsel, with no input from [defendant attorneys]. The consequences of that decision are likewise theirs alone.

One practical impediment is that legal malpractice counsel may be hesitant to sue successor counsel from the underlying case due to a referral relationship. Where that impediment is absent, a legal malpractice case against successor counsel may be viable. For example, in *Baum v. Becker & Poliakoff, P.A.*, 351 So. 3d 185 (Fla. App. 2022), the plaintiff brought a legal malpractice claim alleging that successor counsel failed to salvage her claims by correcting her previous attorneys' mistakes. When successor counsel argued that the underlying litigation was already "Black-Flag" dead before they got involved, the Court held that successor counsel's failure to attempt to prove good cause or excusable neglect created a dispute concerning whether the underlying court would have employed some sanction other than dismissal if successor counsel had made an argument to excuse the failure to serve process.

A leading legal malpractice treatise frames the causation issue as whether, after the discharge or termination of the attorney, sufficient time existed for the client or successor counsel to complete the task alleged to be malpractice:

> A recurring issue concerns where a lawyer's employment ends and ample time remains for the client or successor counsel to complete the task for which the lawyer is sued. Under causation analysis, the lawyer is not liable if there was sufficient time to complete the task. The courts usually decide this issue as a matter of law, though the adequacy of the time remaining or other circumstances can create an issue of fact. [Ronald E. Mallen, 4 Legal Malpractice § 33:12 (2023 ed).]

## Practical Application

This defense can change the tenor of a case. A few years ago, we defended a medical malpractice attorney accused of turning down a birth trauma case after the statute of limitations had already expired. Birth trauma cases can be difficult for medical malpractice attorneys to win, but they produce some of the highest verdicts when successful. The plaintiff's counsel thought they had a slam dunk on the breach of the standard of care because our client had reported that the state law infancy statute tolled the medical malpractice claim until the child's tenth birthday. In fact, at the time, the Affordable Care Act had expanded the class of hospitals for which federal law applied, and federal law did not have such a tolling provision.

Despite this, federal law differed from state law not only regarding tolling for minors, but also regarding accrual. Whereas Michigan law provides for a strict accrual date based on the date of the alleged medical malpractice, federal law allows for a discovery period based on when the plaintiff knew or should have known of a possible claim of medical malpractice. When we were able to show that successor counsel had a viable opportunity to bring a timely medical malpractice action, the plaintiff's counsel in the legal malpractice case suddenly became interested in settlement possibilities.

On other occasions, we have used this argument to defeat arguments brought by in pro per plaintiffs who have either fired their attorneys and proceeded without representation or had a revolving door of attorneys. Inevitably, when such unrepresented parties file a legal malpractice action, they argue that the pleading, strategy, or discovery practice of their original attorney caused the loss of the underlying litigation. In one such case, *Wigger v Attorney*, Muskegon County (Michigan) Judge Timothy G. Hicks held that the causation rule for successor counsel applied to plaintiffs who choose to represent themselves after firing their original attorney:

> Where there is successor counsel, his failure to remedy prior counsel's alleged errors constitutes superseding causation. Mallen, Legal Malpractice, § 33:12

(2016). There seems no reason not to apply this logic when clients choose to represent themselves.

Where there is successor counsel, his failure to remedy prior counsel's alleged errors constitutes superseding causation. Mallen, Legal Malpractice, § 33:12 (2016). There seems no reason not to apply this logic when clients choose to represent themselves.

## Conclusion

Where attorneys make a mistake, it is critical that they acknowledge their mistake and attempt to remedy any error. At the same time, the existence of sufficient time for successor counsel to remedy the alleged error can be a complete defense in a subsequent legal malpractice case. In such cases, a different cake metaphor is appropriate: aggrieved parties cannot eat their cake and have it, too.

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**James "Jim" Edward Lozier**

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**"Jim was an outstanding attorney and a great friend for many years. He will be missed."**

- Michael Fordney, *MDTC Past President '83-'84*

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