



Featured Article

Addressing Venue in Defense of Attorney Malpractice Claims

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As law firms grow larger, many have branch offices in numerous jurisdictions and represent clients from around the country. Even smaller firms may also be inclined to represent out-of-state clients in an effort to expand their client base and guard against economic uncertainty. While this may be a business necessity in modern times, it raises interesting issues when things go sour and a disappointed client brings a malpractice claim. In such an instance, one of the first things defense counsel for the firm needs to ask is whether the forum chosen for the litigation by the plaintiff is, indeed, an appropriate one. This is particularly true when plaintiff brings an action in his/her home state where the firm does not have an office. Of course, when an out-of-state client files a malpractice suit in his or her home state, personal jurisdiction over the defendant law firm is one defense that is commonly considered and raised. Most readers of this article are likely conversant in considerations pertaining to personal jurisdiction. The purpose of this column is to address the applicability of separate, albeit conceptually related, venue-based defenses. While venue defenses may not necessarily stop a case in its tracks, they are certainly worth raising because, if successful, they permit a defendant to litigate the case on its home turf and avoid the expense and inconvenience of litigating in a distant jurisdiction.

A civil action's "venue" simply refers to the location (state and judicial district) in which an action is litigated and, ultimately, tried. Just like personal jurisdiction, proper venue is a "privilege personal to the defendant," and is intended to keep defendants from being inconvenienced by being forced to defend suits in far away jurisdictions. Lamar v. American Basketball Assoc., 468 F. Supp. 1198, 1205 (S.D.N.Y. 1979) (further citations omitted). As a result, it is necessary for a defendant to assert that venue is improper at the outset of the case or seek a transfer to a different venue. Otherwise, the defense is waived. Id.; see also Spencer v. Sytsma, 67 P.3d 1, 6 (Colo. 2003) (filing answers and counterclaims waives venue challenges). This means that defense counsel should assess the venue issue with the client as part of a routine process in preparing an answer to the complaint.

A defendant may raise two types of challenges to venue. First, a defendant can assert

that the case has been brought in an "improper" venue. If venue is improper, the court will either dismiss the case for it to be re-filed in a proper venue, or it may elect to simply transfer the case to another venue where the case could have been properly filed. 28 U.S.C. § 1406. If, on the other hand, the suit was brought in a venue that is technically "proper", the defendant can ask for a transfer on the grounds that it has been brought in an inconvenient forum. 28 U.S.C. § 1404. A successful assertion of this second type of venue defense may result in the claim being tried in the defendant's home state, thereby allowing the case to proceed on familiar ground and avoiding the added stress and expense of litigating in a faraway and unfamiliar jurisdiction.

Several federal statutes govern transfer of cases in the Federal court system. In addition, the determination of whether a case should be transferred, or potentially, dismissed, depends on whether or not the case has been filed in the proper venue in the first instance. Thus, it is important for a party seeking to transfer venue to first determine whether venue is proper in the district in which a case was initially filed. And, although venue and personal jurisdiction are separate, distinct concepts, questions of personal jurisdiction do indeed impact the venue analysis, especially where the defendant is a corporation, such as a law firm.

When defending a case filed in an out of state court, defense counsel should determine whether venue is technically proper. Simply put, the question is whether the case should have even been filed in that Court in the first place – not whether it is the best choice. The inquiry begins with the Federal venue statute, 28 U.S.C. § 1391, which provides that in diversity cases venue may be laid in:

a judicial district where any defendant resides, if all defendants reside in the same State, [or]

a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated... 28 U.S.C. § 1391(a).

Section 1391(b) provides venue requirements for cases where jurisdiction is founded on the existence of a federal question. Although these requirements are similar to those in diversity cases, they shall not be addressed separately here as most legal malpractice claims—which are generally governed by state tort and contract law—will get into federal court based only on diversity jurisdiction.

These provisions provide for what courts have described as "residential" venue (§ 1391(a)(1)) and "transactional" venue (§ 1391(a)(2)). McCaskey v. Continental Airlines, Inc., 133 F.Supp. 2d 514, 523 (S.D. Tex. 2001). In most courts, a plaintiff may choose to lay venue based on either the residential or the transactional venue provision (only if, of course, all defendants reside in the same state), although a "small minority" of courts has found that transactional venue is available only when all defendants do not reside in the same state. See Modaressi v. Vedadi, 441 F.Supp. 2d 51, 55 n.6 (D.D.C. 2006). Section 1391 also provides "fallback" venue provisions for situations in which all

the defendants do not reside in the same state and in which a substantial part of the claim arises from events that happened outside of the United States. See McCaskey v. Continental Airlines, Inc., 133 F.Supp. 2d 514, 525 (S.D. Tex. 2001). This article assumes that the defendant attorney or law firm works in the United States.

In general, it will be relatively easy to determine whether venue is proper based on the "residential" provision, because § 1391(a)(1) applies when all defendants reside in the same state. Before 1990, the statute provided that venue was proper in the district in which the plaintiff resides. This option, however, was removed two decades ago. See Massi v. Lomonaco, 2010 U.S. Dist. LEXIS 58103 (D.S.C. May 25, 2010) ("Since the 1990 amendments to § 1391, the district where the plaintiff resides is no longer a proper venue in diversity actions."). Thus, a defendant must not conclude that venue is proper simply because the plaintiff has filed his malpractice action where he lives.

For venue purposes, an individual resides in the state where he has his domicile. Loeb v. Bank of Am., 254 F. Supp. 2d 581, 586 (E.D. Pa. 2003). It is worth noting however, that when a defendant is a corporation rather than a natural person, it is "deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. § 1391(c); Astro-Med, Inc. v. Nihon Kohden Am., Inc., 591 F.3d 1, 11 (1st Cir. R.I. 2009) (a corporation subject to personal jurisdiction in a state "resides" there for venue purposes). If a state has multiple judicial districts, a corporation is deemed to reside in any district where it would be subject to personal jurisdiction if each district were a separate state. It is certainly tempting for a defendant law firm to argue that it is not a "corporation" and, therefore, venue is not per se proper in every district where it is subject to personal jurisdiction. However, many courts have already determined that for venue purposes, a "corporation" includes unincorporated entities such as partnerships. See MacCallum v. New York Yankees P'ship, 392 F. Supp. 2d 259, 263-264 (D. Conn. 2005) (collecting cases). Even if this argument has not already been decided in the defendant's jurisdiction, given the case law it is likely to fall on deaf ears. 28 U.S.C. § 1391(c).

Thus, if a plaintiff is filing a malpractice action in his home state against a law firm, "residential venue" will always be proper there if the firm is the only defendant and it is subject to personal jurisdiction in the client's home state. The mere fact that an attorney or firm has entered into a fee agreement with an out-of-state client does not automatically subject the attorney to personal jurisdiction in the client's home state. Kelly Law Firm, P.C. v. An Atty. for You, 679 F. Supp. 2d 755, 763 (S.D. Tex. 2009) ("Merely contracting with a resident of the forum state is not sufficient in itself to support the exercise of jurisdiction over the defendant."). For this reason, it is always important to consider personal jurisdiction issues, as a client's home state may not be able to exercise specific jurisdiction even when the claim relates to malpractice. See, e.g. Tom Raper Homes, Inc. v. Mowery & Youell, Ltd., 2007 U.S. Dist. LEXIS 10985, 17-19 (S.D. Ind. Feb. 9, 2007) (finding that the Indiana court did not obtain jurisdiction over Ohio attorneys where the malpractice claim arose out of decisions made in Ohio which were then only communicated to the client in Indiana). This is why venue and personal jurisdiction analyses often go hand in hand even though they are separate

concepts.

Transactional venue, on the other hand, may be laid where a "substantial part of the events or omissions giving rise to the claim occurred..." 28 U.S.C. § 1391(a)(2). Most importantly, "substantial" has been given teeth by the federal courts, which have held that attorney-client communications, whether through letter, telephone or fax, are not by themselves so substantial as to make venue proper in a client's home state. See Loeb v. Bank of Am., 254 F. Supp. 2d 581, 587 (E.D. Pa. 2003) (finding that correspondence and telephone calls that were only "tangentially" related to the alleged malpractice were "woefully insufficient" to establish venue). To determine transactional venue in a malpractice case, courts will generally focus on where the alleged malpractice took place. See Jacobsen v. Oliver, 201 F. Supp. 2d 93, 109 (D.D.C. 2002) (finding that the location where legal services are performed to be significant to the determination of proper venue).

In addition, most circuits have found that the location of the injury -- where the client feels the effects of the malpractice -- is not relevant to the analysis of where a "substantial" part of the acts or omissions took place. The reason is that such an analysis would almost always lead to the plaintiff's home state being a proper venue even in the absence of any other connection to the alleged malpractice, an option which was intended to be foreclosed by the 1990 amendment to the venue statute. Astor Holdings, Inc. v. Roski, 2002 U.S. Dist. LEXIS 758, 23-25 (S.D.N.Y. Jan. 15, 2002) (site of economic injury not relevant to determination of venue). However, not all circuits have reached this same conclusion. See e.g. Myers v. Bennett Law Offices, 238 F.3d 1068, 1076 (9th Cir. Nev. 2001). Thus, if, for example, a Vermont resident sues his California attorneys for malpractice in the conduct of litigation that took place in California, the client would have to show that Vermont had a substantial connection with the alleged malpractice. The mere fact that the client lives in Vermont and may have communicated with the attorney from Vermont should not be sufficient.

However, it is also important to note that the statute does not require transactional venue to be in the state where the most substantial part of the events or omissions occurred, but rather just where a substantial part occurred. This means that venue may be proper in more than one state and that there is no need to determine which state makes the "best" venue. Jacobsen v. Oliver, 201 F. Supp. 2d 93, 108-109 (D.D.C. 2002). Thus, if a client chooses to file suit in another state where legal services were actually rendered, it is quite likely that the client has chosen a proper venue. However, the defendant attorneys can still ask the court to grant a discretionary transfer of venue, which essentially seeks the "best", or at least a better, venue for the action.

Transfer of venue is governed by 28 USCS § 1404(a), which provides, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Transfer of venue used to be accomplished through the doctrine of forum non conveniens. The Supreme Court, however, has clarified that because Congress has codified venue requirements by statute, the "common-law doctrine of forum non

conveniens 'has continuing application [in federal courts] only in cases where the alternative forum is abroad...' Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 430 (U.S. 2007), quoting American Dredging Co. v. Miller, 510 U.S., 443, 449 n. 2 (1994) (bracketed text the court's). When seeking to change venue, therefore, the request should focus on the statutory requirements only.

A prerequisite to transferring venue is that venue must be proper in the proposed transferee court. Assuming that venue would be proper, the decision to transfer a case is "soundly with the discretion of the district court." Inline Connection Corp. v. Verizon Internet Servs., 402 F. Supp. 2d 695, 699 (E.D. Va. 2005).

As a general matter, the plaintiff's choice of forum, assuming that it is a proper forum in the first place, is entitled to be given weight in the court's analysis, especially if the plaintiff has chosen his "home forum." Lycos, Inc. v. TiVo, Inc., 499 F. Supp. 2d 685, 692 (E.D. Va. 2007). Obviously, the plaintiff's choice of forum cannot be dispositive of the issue, as no action would ever be transferred if the suit was brought in a proper forum. And, if the plaintiff's choice of forum is only "tenuously" connected to the suit, then a court will not give much weight at all to such a choice. Id.

When weighing a request to transfer venue, courts engage in a case-specific analysis rather than following a rigid formula. Courts, do, however, consider a number of specific factors, including the ease of access to sources of proof, including documents, and the ease with which parties and witnesses may appear at trial, including whether the court would have the power to compel the appearance of non-party witnesses. Id. at 693. Courts will not, however, transfer venue if doing so would merely "shift the inconvenience" from one party to another. Kelly v. MD Buyline, Inc., 2 F. Supp. 2d 420, 442 (S.D.N.Y. 1998). The court will also consider the interests of each forum state in deciding the controversy, which involves an inquiry into which state is most related to the claims.

In practice, a court will generally put the most weight on the convenience of witnesses in appearing at trial. Consider the above situation—and assume that venue is proper in both states—where a Vermont client sues his attorneys in Vermont for malpractice in California in connection with a case litigated before a California court. The witnesses to the alleged malpractice, the client's attorneys, staff members, the opposing parties and attorneys in the underlying litigation would all be located in California and would be inconvenienced by litigating in Vermont. The documentary evidence regarding the malpractice would also be located in California, although given the ability to transmit even voluminous documents electronically, courts no longer put great weight on this factor. Moreover, the actual malpractice would have occurred in California, not in Vermont, and California has a substantial interest in adjudicating malpractice claims where the attorneys are licensed in California. Where those attorneys are not admitted in Vermont as well, California's interest would most likely outweigh Vermont's interest in protecting its citizens from legal malpractice. All of these factors would militate in favor of a Vermont court transferring the case to California, where the malpractice actually occurred.

Finally, defense counsel should also review the fee agreement between the defendant firm and the client to determine whether it contains a forum selection clause. Such a clause is generally enforceable and can keep the lawyer from having to litigate a claim in an inconvenient forum. Ginter v. Belcher, Prendergast & Laporte, 536 F.3d 439 (5th Cir. 2008). Although the dispute about forum in the Ginter case was over whether it would be litigated in state or federal court, the court noted that a forum selection clause might only "perhaps" be void if it selected "a far-flung forum to discourage litigation." Id. at 444. However, the Court specifically noted that the agreement required any claims to be litigated in Louisiana, where all of the legal work was to take place, and, therefore, Louisiana was "an entirely reasonable forum." Id. The takeaway then is that if an attorney's fee agreement requires disputes to be litigated in the state in which the legal work will actually be done, a court is more likely to find that it is reasonable and hold it enforceable. The Court quickly disposed of an argument that the forum selection clause does not apply in a case based on tort (malpractice) rather than breach of contract, noting that while the plaintiffs' claims "sound in tort, the [plaintiffs] are complaining about the failure of [their attorney] to fulfill his contractual obligations." Id. at 445.

While the enforcement of such a provision may vary from state to state, certainly, this is another issue that defense counsel should consider as part of the usual response to a complaint against an attorney client.

In sum, raising a successful venue argument may not stop a malpractice case in its tracks but it can certainly make it easier to defend. Because venue will be waived if not raised in an initial response to the complaint, it must be considered at the outset of the case along with other important defenses such as subject matter and personal jurisdiction. A motion to transfer venue can pay dividends in the long run by avoiding the time, expense and added inconvenience of defending a case in a far-away state.

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