Legal Malpractice Actions

Proving the "Case-Within-the-Case" Standard

By Aaron E. Moore and Kyle M. Heisner

Most courts have concluded that "but-for" causation is the proper proof standard in legal malpractice actions, yet plaintiffs' attorneys do attempt to convince courts to allow a lower threshold.

The failure to file a lawsuit by the statute of limitations date can have harsh consequences. No matter how meritorious the case may have been or how significant the damages, a statute of limitations can serve as a complete and total bar to recovery for a plaintiff—often through no fault of the plaintiff's. For the attorney who failed to meet that deadline, however, the litigation is far from over. In a subsequent legal malpractice action, the plaintiff and former client of the attorney defendant must present evidence to prove what is referred to as the "case-within-the-case," or the "trial-within-the-trial," standard.

This article will address some of the various issues that may arise when defending a legal malpractice action on the basis that the plaintiff would not have prevailed in the underlying case. These issues include confronting the arguments that it is unduly burdensome for a plaintiff to have to prove two cases, the plaintiff should only have to prove that he or she would have received a settlement offer in the underlying action, evidence of legal malpractice should be presented to the jury when liability is stipulated, and expert testimony should be permitted to persuade the legal malpractice jury how the underlying jury would have decided the case.

Each of these issues recently arose in a legal malpractice action that we defended against. In this case, the defendant attorney had stipulated to liability for a late-filed complaint. The plaintiff's attorney retained a retired judge to testify that the plaintiff would have obtained a favorable settlement in the underlying case and that had the underlying case gone to a jury, she would have prevailed. Moreover, the plaintiff's attorney sought to place our client on the witness stand to testify about his handling of the underlying file—despite the testimony having no probative value after liability was stipulated.

The Case-Within-the-Case Standard for Establishing Causation

Proving the case-within-the-case is a necessary element of both causation and damages in a legal malpractice action arising from an underlying lawsuit. If the original litigation would have resulted in a defense verdict, then the plaintiff did not lose anything as a result of the attorney missing the statute of limita-

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tions (or any other form of negligence that prevents a case from reaching a verdict). Even in those cases that would have resulted in a favorable verdict, proving the case-within-the-case is necessary to determine how much that verdict would have been worth had the case proceeded through trial.

An example involving a late-filed complaint causing the action to be time barred under a statute of limitations provides the clearest example for evaluating the importance of the case-within-the-case. If all that is known is that a complaint was filed after the applicable deadline, proving legal malpractice may be the simplest part of the plaintiff's subsequent lawsuit against his or her former attorney. When there is no dispute that the attorney erred, liability is often stipulated by the attorney. However, assessing causation and damages is an entirely different question. What did that professional negligence actually cost the client? Was the lawsuit meritorious, and if so, was it worth hundreds, thousands, or millions of dollars?

Critics of the "but-for" causation standard argue that it is unduly burdensome for a legal malpractice plaintiff to be required to prove not only the former attorney's negligence, but also the merits of the underlying cause of action.

By and large, the standard that courts have adopted for proving the case-within-the-case is the "but-for" causation standard. Essentially, this standard divides the legal malpractice case into two parts. The first is proving that the attorney breached the standard of care. As mentioned, this is often stipulated when the basis for the legal malpractice action is a missed filing deadline through no fault of the client.

The second part of a legal malpractice action is the case-within-the-case. In the example of a missed filing deadline, the case-within-the-case is the merit in the claim or claims that were never able to proceed because of the attorney's negligence. Although proving that the attorney was negligent for missing a filing deadline may be rather straightforward, proving causation of actual damages in the case-within-the-case can be much more complicated. This will, of course, depend on how complex the underlying litigation would have been had the complaint been timely filed. In the subsequent legal malpractice action, the plaintiff's former attorney steps into the shoes of the original defendant. The plaintiff's new legal malpractice attorney, in turn, will step into the shoes of the attorney now being sued and will be forced to prosecute the action as if the complaint had been timely filed.

The "But-For" Causation Is Not Unduly Burdensome to Plaintiffs

Critics of the "but-for" causation standard argue that it is unduly burdensome for a legal malpractice plaintiff to be required to prove not only the former attorney's negligence, but also the merits of the underlying cause of action. They contend that it is unjust for an aggrieved plaintiff to have to prove two cases to recover because it adds increased complexity and makes recovery more difficult. The approach has been deemed inequitable since it can preclude recovery, no matter how outrageous or unethical the former attorney's behavior may have been, and it requires reconstruction of a trial that most likely never would have occurred. Such a criticism is misplaced, however.

The ordinary fact that certain allegations are more complex and difficult to prove than others does not justify lowering the standard of proof threshold. For instance, a medical malpractice action against a doctor may involve more fact investigation, record review, legal analysis, and expert expenses than a routine motor vehicle accident. But none of these things justify tipping the scales of justice toward the plaintiff through a lower standard of proof threshold merely because the litigation is inherently more complex and costly.

In fact, legal malpractice actions are often no more complex than the underlying cause of action. In the case of a missed statute of limitations date, liability for professional malpractice may be stipulated by the attorney defendant, and the case will proceed only based on damages. In such a case, when the amount of the potential damages is quantified by the lost value of the underlying judgment, proving the legal malpractice case is no different and no more burdensome than proving the underlying case. Further, no public policy or rule of law supports a lowering the threshold for proving the damages actually sustained in a subsequent legal malpractice case from that which would have been required in the initial underlying action. The negligence of one's former attorney should not be treated as a boon to that plaintiff's case.

The Settlement Value of the Underlying Case Is Irrelevant

Another criticism of requiring legal malpractice plaintiffs to prove the case-within-the-case, or to conduct a trial-within-the-trial, is that it ignores the settlement value that the underlying case had. In a legal malpractice action, a plaintiff's attorney may argue that the plaintiff should have a lower burden of proof threshold to recovery—that the plaintiff should only have to show that he or she would have received a settlement offer rather than actually having to prove the merits of the underlying case. The plaintiff's attorney may argue that the damages should be measured by the demand in the underlying action, if one was issued, no matter how much puffery was involved in making such a demand. Legal malpractice plaintiffs will often argue that their original case must have had merit or their former attorney would not have taken the case. These concerns are not relevant to proving whether actual damages were incurred.

Under Federal Rule of Evidence 401 and correlating state rules, evidence is relevant if "[i]t has any tendency to make a fact more probable or less probable than it would be without the evidence." Relevant evidence is admissible but it may be excluded "if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wast-

ing time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Evidence should be excluded when it has an undue tendency to suggest a decision was made on an improper basis, and a jury's verdict should not be affected or influenced by considerations extraneous to the merits of the lawsuit, such as sympathy, passion, emotion, prejudice, or bias.

Applying these basic tenets of the rules of evidence, a jury's assessment of damages in a legal malpractice case should not be based on their opinion of how the defense attorney handled the original litigation, or what anyone other than the jurors thinks is the value of the plaintiff's damages. It is true that far more civil cases settle than go to trial. It is easy to see the logic behind the argument that what a legal malpractice plaintiff lost due to his or her former attorney's negligence was the *opportunity* to settle the underlying action. The critical flaw with that logic, however, is that there is also an opportunity to settle *the legal malpractice* action before it goes to a trial. If the legal malpractice case cannot settle before a trial, then settlement is no more relevant in that case than it would have been in the principal action had it proceeded.

And it is a long-established principle that "[w]hat would have been the result of a previous trial presenting issues of fact normally is an issue for the factfinder in the negligence or fiduciary-breach action." Restatement (Third) of the Law Governing Lawyers §53 (3rd 2000).

> The plaintiff must thus prevail in a "trial within a trial." All the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial; in considering whether the plaintiff has carried that burden, however, the trier of fact may consider whether the defendant lawyer's misconduct has made it more difficult for the plaintiff to prove what would have been the result in the original trial.

Id.

The opinion of parties or experts regarding the settlement value of the underlying case in a legal malpractice case has no probative value and should not be permitted. In a legal malpractice case, it is irrelevant whether the underlying defendant would have settled the case to avoid the cost of litigation, or due to concern over how a jury might rule, or for any of a number of other reasons. The standard is whether the plaintiff would have been able to receive a "judgment" if not for, or "but for," the attorney's negligence. That is what must be determined at trial. The sub-issue of settlement value should not be injected into such a case because it has no relevance to the ultimate merits. It is a jury's role to determine the value of the injuries or other damages. Permitting a jury to hear what others think of the value has the obvious potential for prejudice.

Evidence of Attorney Malpractice Should Be Excluded When Liability Is Stipulated

As previously mentioned, attorneys will sometimes stipulate to liability in a legal malpractice action when liability against them is clear and the plaintiff was faultless in causing the underlying claim to be lost. In such cases, evidence of legal malpractice should not be presented to a jury other than what is required to explain the roles of the parties in the case. When an attorney has stipulated to negligence, presenting his or her negligent act should be limited to the most cursory explanation to a jury since there is no probative value to anything more, and there is the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Allowing more than a cursory explanation would inject considerations extraneous to the merits of the lawsuit, such as anger that a lawyer would allow a client to lose a claim against an alleged negligent actor. A jury could assume that the attorney's error alone should result in a damages award for the plaintiff. Such an improper inference would be even more likely if a plaintiff is able to demonstrate that he or she sustained significant damages as a result of the underlying incident because jurors, under such circumstances, may be less inclined to consider whether the underlying defendant, who is not a party to the legal malpractice action, actually caused the plaintiff's damages.

On balance, evidence of an attorney defendant's actions has absolutely no probative value in a legal malpractice case. For example, a plaintiff's attorney may seek to call the defendant attorney to the stand and elicit testimony about his or her opinion on the settlement value of the underlying claim. If the defendant attorney made a large "opening" demand to begin settlement negotiations, and if later, in the legal malpractice case, he or she testifies that the value was not as much as the initial demand issued to the original, underlying defendant, the jury might conclude (incorrectly) that he or she is being dishonest to minimize damages in the legal malpractice action. Jurors might reach countless other conclusions—none of which would be proper for them to consider in determining the merits of the trial-within-the-trial.

Furthermore, potential prejudice aside, it would extend the trial and waste judicial resources—all for no purpose other than to divert the jurors' attention away from the actual merits of the trial-within-the-trial. For instance, a defendant attorney may be required to put on witness testimony and present evidence on the negotiation process in the underlying litigation, to explain to a jury why an initial demand generally does not reflect the amount for which the attorney realistically would expect a case to resolve.

Experts Should Not Usurp the Role of a Jury in a Legal Malpractice Case

Another tactic that plaintiffs' counsel will sometimes use in legal malpractice actions is to hire an expert, such as an experienced lawyer or retired judge, to comment on the settlement or verdict potential of the underlying action. But the opinions of expert witnesses about the viability and the settlement value of the original case cannot supplant a plaintiff's requirement to prove the case-within-the-case. The only proper uses of an expert in a legal malpractice action are to prove the legal malpractice aspect of the case, when it is necessary to do so, or when an expert is necessary to prove an element of the principal case, such as a medical expert commenting on a doctor's standard of care or the injuries sustained by a plaintiff.

Looking again to the missed statute of limitations and subsequent liability-

stipulation example, an expert witness's opinion of the underlying case's value has no probative value relevant to whether the original defendant was, in fact, negligent, or to the extent of the damages that the plaintiff sustained. This determination is exclusively in the province of the jury, which itself must evaluate the evidence.

Furthermore, expert testimony on verdict potential and settlement value may be useful for settlement discussion purposes to sway the other side in other types of cases, but they would lead to paradoxical results if they were permitted to be elicited at trial. A jury would be asked to consider an expert's opinion on how he or she predicts another jury would have reacted to the facts of the underlying case. The biggest uncertainty in any trial is the makeup of the specific jury selected and how the jurors will evaluate the testimony presented. This uncertainty is what leads parties to settle rather than leave their fate to a panel of jurors who they have never met. Once a jury is selected and presented with the facts, however, that uncertainty is gone. Is a jury in a legal malpractice action supposed to attempt to reinsert the uncertainty and self-correct their findings to reflect what an "average" jury might find? The most straightforward, simple, and proper approach is for the jury in the legal malpractice case to reach its own decision, based on the facts in the underlying case and the testimony on the plaintiff's alleged damages, whether they be personal injury-related or in some form of economic loss.

When an attorney has stipulated to negligence, presenting his or her negligent act should be limited to the most cursory explanation to a jury since there is no probative value to anything more, and there is the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Similarly, expert opinion on the potential lost-settlement range or verdict-predicting testimony in the principal action would inevitably result in juror confusion. Is the legal malpractice-case jury to reach a verdict based on the evidence, as a jury in the original case would do, or is the legal malpractice-case jury to conform its assessment of damages to the risk-averse settlement range proposed by an expert? For example, if a jury finds that pain and suffering damages in an underlying personal injury action would have been in the amount of $100,000, but the expert's proposed lost-settlement range was $25,000 to $75,000, is the jury required to adjust this amount to the high end of the settlement range proposed by the expert? On the other hand, if the jurors find that the underlying defendant was not negligent, are they required to increase the amount to reflect that the original defendant would have likely made at least a cost-of-defense or nuisance settlement offer?

A jury has great discretion in deciding the amount to be awarded in a verdict, and rarely will this verdict be overturned by the court. Allowing expert testimony from retired judges or experienced practitioners would have a clear chilling effect on a jury's autonomy to assess liability and damages. Further, assuming that both sides hire competing experts, a jury will be required to reach a conclusion about the value of the damages based on the evidence anyway, and therefore, adjusting any such opinion to conform to the opinions of experts only adds another layer of complexity for the jury.

Courts' Shifting Standards

Pennsylvania is among the vast majority of courts that have held that a legal malpractice plaintiff must prove the case-within-the-case. As explained by the Pennsylvania Superior Court in *Myers v. Robert Lewis Seigle, P.C.*, 751 A.2d 1182 (Pa. Super. 2000), "[a]lthough it may impose a particular hardship on a malpractice plaintiff to show that he would have prevailed in the underlying action in order to establish actual damages, the potential problems facing attorneys in the absence of such a rule would seem more monumental." Pennsylvania courts, including the Pennsylvania Supreme Court, have further held that to "prevail" means that a legal malpractice plaintiff must show that he or she would have received a "judgment" in the underlying action—not merely a settlement offer.

Rarely have some Pennsylvania courts deviated from the requirement to prove the case-within-the-case, and when they have, it was under unique circumstances. For example, the trial court in *Rice v. Saltzberg, Trichon, Kogan & Wertheimer, P.C.*, 2006 Phila. Ct. Com. Pl. LEXIS 35 (Phila. C.C.P. 2006), permitted opinion testimony from a New York personal injury attorney on the value of the underlying personal injury case. In doing so, the court explained that there "was ample evidence from which the jury concluded that defects and cracks on the New York City sidewalk caused Louise Rice to slip and fall," but "a Philadelphia jury requires expert guidance on the technical issues of the personal injury environment and resolution of personal injury claims in New York City." As such, expert opinion was permitted by the trial court due to an unspecified difference in how a New York jury would view the case as opposed to a Philadelphia jury. The trial court's decision was affirmed without opinion on appeal, leaving it uncertain whether the appellate court agreed with the trial court that the expert opinion testimony on settlement value was proper or merely "harmless error."

Other jurisdictions previously attempted to lessen the proof burden for legal malpractice plaintiffs, only to reverse course and move back to the "but-for" causation standard. For instance, the Supreme Court of Ohio created what was referred to as the "some evidence" rule in *Vahila v. Hall*, 77 Ohio St.3d 421, 674 N.E.2d 1164 (Ohio 1997). In *Vahila*, the Ohio Supreme Court held that "[a] plaintiff may be required, depending upon the situation, to provide some evidence of the merits of the underlying claim." Subsequent Ohio courts

grasped this language as a rejection of the case-within-the-case test and applied a lesser standard of "some evidence" for a plaintiff to show that the underlying claim was meritorious.

Over a decade later, in *Envtl. Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St. 3d 209, 893 N.E.2d 173 (Ohio 2008), the Supreme Court of Ohio clarified that its "[r]efusal to adopt a blanket rule of law requiring the case-within-a-case approach [in *Vahila*] was not a wholesale rejection of that doctrine." The court found that there was a key distinction between situations in which a plaintiff "sustained losses regardless of whether their underlying case was meritorious," as was the case in *Vahila*, and cases in which damages were defined solely by the lost claim in the underlying action. As such, the court in *Envtl. Network Corp.* held that it was improper for the plaintiff's expert in the principal action to assume that the claim was viable without objectively evaluating the viability through a review of the pleadings and other relevant documents. After these more recent decisions, the "but-for" standard has been reasserted in Ohio, albeit with the door left open for a less burdensome standard for plaintiffs in certain circumstances.

Similarly, a decades-old decision from the Supreme Court of California had been interpreted as imposing an inference of causation on the defendant attorney that was then his or her burden to rebut. In *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589 (Cal. 1975), the court imposed liability for the attorney's failure to assert a claim that was merely arguable. The decision permitted the jury merely to evaluate damages as the result of the presumed lost opportunity in the underlying action, unless the defendant attorney could present evidence to establish that the underlying claim, in fact, was not meritorious.

California has since moved away from such a standard, requiring the same "but-for" proof of causation as most other jurisdictions. In *Filbin v. Fitzgerald*, the court clarified that based on more recent California law, to prevail in a legal malpractice action, "[s]imply showing [sic] the attorney erred is not enough." 211 Cal. App. 4th 154, 166, 149 Cal. Rptr. 3d 422, 432 (Cal. Ct. App. 2012) (internal citation omitted) (alteration and grammar error in original). The court explained that "legal certainty" of actual damage was required by proving the case-within-the-case, and mere attorney breaches of the standard of care are insufficient.

Conclusion

Both public policy and the vast majority of courts have concluded that "but-for" causation is the proper standard to apply to legal malpractice actions. While such a requirement adds one more hurdle for an aggrieved plaintiff to recover damages, it is neither unfair nor unduly burdensome. This standard merely requires that a plaintiff prove what the plaintiff would have been required to prove if not for the alleged negligence of his or her attorney. If the negligence is clear, or if the attorney stipulates to it, then the "but-for" causation is no more complex than what the plaintiff would have faced in the underlying action.

In addition, if the parties dispute whether the attorney was negligent, it would be unjust to impose a lower proof threshold merely because of an attorney's position as the plaintiff's former attorney. A legal malpractice defendant should not be placed in a worse position than the original tortfeasor. All of these factors weigh in favor of the well-reasoned "but-for" causation standard, barring exceptional circumstances. FD