CASE LAW UPDATE ON THE "TRIAL-WITHIN-A-TRIAL" IN LEGAL MALPRACTICE CASES

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The "trial-within-a-trial" approach to handling legal malpractice litigation has developed at a slow pace in the last 5 years.[1] A survey of national cases reflects the lack of guidance the courts are providing attorneys on how to effectively present a trial-within-a-trial. Since 1998, very few of the recently reported appellate cases discuss the structure or issues presented in a trial-within-a-trial scenario. Therefore, plaintiff and defense counsel must use their experience, instincts and best judgment to determine what is the best course of action in the structuring of the trial-within-a-trial.

The cases cited in this overview reflect a void in precedent to guide attorneys in their respective jurisdictions, and therefore, the courts from the various states are going outside of their jurisdiction and borrowing from each other in order to build a rational and consistent approach to handling the complexities of legal malpractice litigation. As a result, this paper cannot address all of the many possible issues that may arise in the litigation of a legal malpractice case, much less for all of the states. The following is a survey of cases, within the

[1] In some states, a trial-within-a-trial is also referred to as a "suit-within-a-suit" or a "case-within-a-case."

last 5 years, which address various important issues that may be encountered in the application of the trial-within-a-trial methodology.[2]

TRIAL-WITHIN-A-TRIAL

In most states, in order to prevail on a legal malpractice claim, the plaintiff must usually prove three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence resulted in and was the proximate cause of loss to the client.[3] *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325 (Fla. 4th DCA 1998); *Kituskie v. Corbman*, 552 Pa. 275, 714 A.2d 1027 (1998); *Marrs v. Kelly*, Ky., 95 S.W. 3d 856, 860 (2003); *Thomas v. Bethea*, 351 Md. 513, 718 A. 2d 1187 (1998). The third element, concerning the client's loss, is not satisfied unless the client shows that there is an actual amount of damages which the client would have recovered *but for* the attorney's negligence. *Tarleton*, 719 So. 2d at 328; *Kituskie*, 552 Pa. at 281. This element has resulted in a legal malpractice case to be called a trial-within-a-trial. *Tarleton*, 719 So. 2d at 328. Therefore, in order to prevail on a legal malpractice claim, the plaintiff must prove that he would have been successful in the prosecution or defense of the underlying civil action *but for* the attorney's negligence. *Tarleton*, 719 So. 2d at 328; *Hicks v. Nunnery*, 253 Wis. 2d 721, 747, 643 N.W.2d 809 (2002); *Whitley v. Chamouris*, 574 S.E.2d 251, 253, 265 Va. 9 (2003); *Viner v. Sweet*, 30 Cal. 4th 1232, 70 P. 3d 1046 (2003); *Lombardo v. Huysentruyt*, 91 Cal.App.4th 656, 665, 110 Cal.Rptr.2d 691 (2001); *McKenna v. Forsyth &*

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[2] "Although no bright line rule tells us when this methodology must be used, *it is quite clear that, when the malpractice involves negligence in the prosecution or defense of a legal claim, the case-within-a-case method is appropriately employed.*" *Herrington & Sutcliffe, LLP v. The Superior Court for the City and County of San Francisco*, 107 Cal.App.4th 1052, 1057, 132 Cal.Rptr. 2d 658 (2003), *quoting California State Auto. Assn. Inter-Ins. Bureau v. Parichan, Renberg, Crossman & Harvey*, 84 Cal.App.4th 702, 101 Cal.Rptr. 2d 72 (2000).

[3] In some jurisdictions, these same elements are referenced as four separate elements: (1) a lawyer-client relationship existed; (2) the defendant committed acts or omissions constituting negligence; (3) the attorney's negligence caused the plaintiff injury; and (4) the nature and extent of injury. *Hicks v. Nunnery*, 253 Wis. 2d 721, 747, 643 N.W.2d 809 (2002); *Lombardo v. Huysentruyt*, 91 Cal.App.4th 656, 665, 110 Cal.Rptr.2d 691 (2001).

Forsyth, 280 A.D.2d 79, 82, 720 N.Y.S.2d 654 (2001); *Fabricare Equipment Credit Corp. v. Bell, Boyd &* Lloyd, 328 Ill.App. 3d 784, 767 N.E.2d 470, 263 Ill.Dec. 19 (2002); *Schaeffer v. O'Brien*, 39 S.W.3d 719 (Tex.App.-- Eastland 2001). This is an objective standard. *Lombardo*, 91 Cal.App.4th at 669; *Marrs*, 95 S.W. 3d at 861. The jury "determines what *should* have been, not what the result *would* have been, or could have been, or might have been, had the matter been before a *particular judge* or jury." *Lombardo*, 91 Cal.App.4th at 669; *Deeter v. McNicholas*, 2002 WL 1898161, *5 (Cal.App. 2 Dist).[4] "The purpose of this methodology is to avoid damages based on pure speculation and conjecture." *Herrington & Sutcliffe, LLP v. The Superior Court for the City and County of San Francisco*, 107 Cal.App.4th 1052, 1057, 132 Cal.Rptr. 2d 658 (2003); *Viner*, 30 Cal. 4th at 1241. "The mere breach of a professional duty, causing only nominal damages, speculative harm or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." *Id*. at 1058.[5]

BURDEN OF PROOF

In a legal malpractice case, a client must prove by a *preponderance of the evidence* that, *but for* the negligence of the attorney, she would have prevailed in the underlying claim or has suffered actual damages. *Kituskie*, 552 Pa. at 282; *Ferguson v. Lieff, Cabraser, Hiemann & Bernstein, LLP*, 30 Cal.4th 1037, 1049, 135 Cal.Rptr. 2d 46, 69 P.3d 965 (2003); *Shaw v. State of Alaska, Department of Administration*, 861 P. 2d 566, 573 (Alaska 1993); *Hicks*, 253 Wis. 2d at 754; *McKenna v. Forsyth & Forsyth*, 280 A.D.2d 79, 84, 720 N.Y.S.2d 654 (2001); *Whitmore*

[4] This opinion has not been certified for publication or ordered published for purposes of California Rules of Court Rule 977.

[5] Q*uoting Budd v. Nixen*, 6 Cal.3d 195, 200, 98 Cal.Rptr. 849, 491 P.2d 433 (1971).

v. Paul, 2003 WL 1383465, *4 (Cal.App. 2 Dist.).[6] A plaintiff in a legal malpractice case does not need to prove "what outcome a particular fact-finder in the underlying claim would have reached." *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 157 N.C.App. 60, 66, 577 S.E.2d 918 (2003). The jury must apply the relevant law, as instructed by the court, to the facts of the underlying claim, and then render a decision. *Id.*

Louisiana has modified the trial-within-a-trial method by shifting the burden of proof. In Louisiana, the defendant attorney must, by a preponderance of the evidence, produce sufficient proof to overcome plaintiff's *prima facie* case that the attorney caused some loss. *Bauer v. Dyer*, 782 So. 2d 1133, 1140 (La.App. 5th Cir. 2001).[7]

THE STRUCTURE OF A TRIAL-WITHIN-A-TRIAL

There are very few cases in the last 5 yeas addressing the question of how to structure a trial-within-a-trial. The Pennsylvania Supreme Court has ruled that "only after the plaintiff proves he would have recovered a judgment in the underlying action that the plaintiff can then proceed with proof that the attorney he engaged to prosecute or defend the underlying action was negligent in the handling of the underlying action and that negligence was the proximate cause of the plaintiff's loss since it prevented the plaintiff from being properly compensated for his loss." *Kituskie*, 552 Pa. at 282. In Florida, the Fourth District Court of Appeal held that "[u]nder the 'trial within a trial' standard of proving proximate cause, the jury necessarily has to determine whether the client would have prevailed in the underlying action, in this case the dissolution

[6] This opinion has not been certified for publication or ordered published for purposes of California Rules of Court Rule 977.

[7] In Louisiana, "an attorney is negligent if he accepts employment and fails to assert timely a viable claim or causes a loss of opportunity to assert a claim for recovery." *Id*. at 1140.

action, before determining whether the client would prevail in the malpractice action." *Tarleton*, 719 So. 2d at 330 (*emphasis supplied*).

In *McKenna, supra*, the appellate court revealed that the trial court bifurcated the trial:

> In the first phase the jury was to find liability and damages arising from the [underlying claim], and in the second phase it was to find the amount that would have been collectible from [the defendant in the underlying claim].

McKenna, 280 A.D.2d at 81 (*emphasis supplied*). *McKenna* is about a legal malpractice claim based on an underlying personal injury claim involving an automobile accident. In the complaint, plaintiffs alleged that the defendant attorneys were negligent in failing to commence an action against the defendant motorist in a timely manner. After the *first phase* of the trial, the jury found that the plaintiff sustained serious injury and had sustained damages in the amount of $535,251.41. During the *second phase* of the trial, plaintiffs presented evidence that the defendant in the underlying personal injury action had liability insurance and owned assets. The Defendant attorneys presented evidence that the defendant in the underlying action had a limit on his liability insurance and that he would have filed for bankruptcy if a judgment were rendered against him. The jury found that plaintiffs would only have collected the liability policy limits if they would have obtained a judgment against the defendant in the underlying case following the *first phase* of the trial. The trial court awarded judgment to the plaintiffs in the amount of the policy limits.

In *McKenna*, the court emphasized that the trial-within-a-trial "adds an additional layer to the element of proximate cause, requiring the jury to find the hypothetical outcome of other litigation before finding the attorney's liability in the litigation before it." *McKenna*, 280 A.D.2d at 82 (*emphasis supplied*). In the first phase of the trial, plaintiffs met the burden of establishing that, but for defendants' negligence, they would have succeeded in the underlying action against

the defendant and that they would have obtained judgment in the amount of $535,251.41. The Court further ruled that plaintiffs' loss in the underlying claim is "distinct from the loss resulting from defendants' failure to commence a timely litigation." *Id*. at 82. At the end of the *first phase*, the "amount of damages proximately caused by the *defendants'* negligence remained unproven." *Id*. at 82. The court ruled that the trial "court properly determined that plaintiff's damages in the malpractice action were limited to the amount that would have been collected from [the defendant] in the underlying litigation." *Id*. at 82. Therefore, plaintiff's damages are "the amount he would have collected from [the defendant in the underlying litigation], not the amount the jury awarded after the first phase of the trial." *Id*. at 83.[8] During the *second phase* of the litigation, the plaintiff has the burden of proving, *by a preponderance of the evidence*, the amount that would have been collected from the defendant in the underlying litigation. This is "part of the plaintiff's affirmative case." *Id*. at 84. In *McKenna*, the court followed the majority opinion that the plaintiff has the burden of proof as to the collectability in the underlying case.[9]

A minority of jurisdictions have ruled that "collectability" is an affirmative defense that must be plead and proven by the defendant attorney. In *Kituskie v. Corbman*, 552 Pa. 275, 714 A.2d 1027 (1998), the Supreme Court of Pennsylvania held that collectibility of damages is an issue which should be considered in a legal malpractice case, but that it would "adopt the minority position and hold that a defendant/lawyer in a legal malpractice action should plead and prove the affirmative defense that the underlying case was not collectible by a preponderance of the evidence." *Id*. at 285.

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[8] *See also Schaeffer v. O'Brien*, 39 S.W.3d 719, 721 (Tex.App.-- Eastland 2001).

[9] *See also Whitmore v. Paul*, 2003 WL 1383465, *4 (Cal.App. 2 Dist.); *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 157 N.C.App. 60, 577 S.E.2d 918 (2003).

EVIDENCE AND EXPERT WITNESSES

In *Whitley v. Chamouris*, 574 S.E.2d 251, 265 Va. 9 (2003), the Supreme Court of Virginia held that in a legal malpractice case that involves a case within a case the

> plaintiff must present virtually the same evidence that would have been presented in the underlying action. Similarly, the defendant is entitled to present evidence and assert defenses that would have been presented in the underlying action.

Id. at 252-253. The sole issue on appeal was "whether expert testimony was required to establish proximate causation in a legal malpractice action." *Id*. at 252. The Court concluded that the "trial court did not err in holding that expert testimony was not required to prove causation in this legal malpractice action." *Id*. at 253. The Court reasoned that since a witness cannot predict the decision of a particular jury, it can "not be the subject of expert testimony." *Id*. at 253. Further, the Court held that expert testimony evaluating the legal merits of an underlying claim "would be improper because it would be legal opinion." *Id*. at 253. Recently, courts in various jurisdictions have ruled on issues concerning the use of expert witnesses in the context of a trial-within-a-trial. In *Tarleton*, *supra*, the appellate court held that the "trial court erred in ruling that [the plaintiff] failed to satisfy the proximate cause element because she did not present expert testimony specifically stating that she would have obtained a more favorable result but for the Firm's negligence." *Tarleton*, 719 So. 2d at 330. A jury, sitting as the trier of facts of the underlying action, can determine from the evidence presented what damages would have been awarded if she had gone to trial and concluded whether the amount is greater than the settlement agreement. *Id*. at 330.[10] Therefore, the client had established the necessary proximate cause element.

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[10] In this case, the jury was substituting its judgment for that of a trial judge in a dissolution matter. The court held that there was no need for expert testimony specifically stating what a reasonable judge would have awarded in the settlement agreement.

In *Marrs*, the Supreme Court of Kentucky adopted the objective standard by holding that the it was to be applied in legal malpractices cases. *Marrs*, 95 S.W. 3d at 861. In this trial-within-a-trial, the trial court allowed the workers' compensation judge in the underlying claim to testify as to what a reasonable judge should have done. The Court held that "[e]ven when the objective standard is observed in a legal malpractice case, the judge in the underlying case may not testify as to what a reasonable judge should have done." *Id*. at 861. The Court reasoned that it was a "question of fact, and the jury in the legal malpractice case must decide what the result would have been in the underlying case if the omitted evidence had been presented to a fair, reasonable, competent workers' compensation judge." *Id*. at 861. The case was remanded to the trial court with instructions to exclude the judge's testimony.

In *Hummer*, *supra*, the Court of Appeals of North Carolina held that "expert testimony is inadmissible when the expert is testifying to the legal effect of specific facts." *Hummer*, 157 N.C.App. at 67. The Court further held that "expert testimony simply telling the jury the result they should reach is also inadmissible." *Id*. The Court ruled that the trial court properly excluded expert testimony that offered to tell the jury what result the fact finder would reach as well as what result they should reach as a legal conclusion.

DAMAGES

In Illinois, a plaintiff must establish what the result would have been in the underlying case which was improperly litigated by the former attorney in order to recover damages. *Eastman v. Messner*, 188 Ill. 2d 404, 411, 721 N.E. 2d 1154, 242 Ill.Dec. 623 (1999). Actual damages must be affirmatively proved by the plaintiff. *Id*. A "plaintiff's damages in a malpractice suit are limited to the actual amount the plaintiff would have recovered had he been

successful in the underlying case." *Id*. at 412. The Supreme Court of Illinois further held that the "legal malpractice plaintiff is entitled to recover only the property interest lost as a result of the alleged malpractice, an amount necessarily limited to the net amount the plaintiff would have ultimately recovered in the underlying tort case." *Id*. at 413.

The case of *Thomas v. Bethea*, *supra*, involves the underlying claim that the defendant attorney negligently recommended settlement. In *Thomas*, the Court of Appeals of Maryland held that the "measure of damages necessarily becomes the difference between what was accepted in settlement and what likely would have been received from the adjudication." *Id*. at 533.[11] The Court stated that the "normal way in which that approach is implemented is through what has become known as a trial within a trial, or a suit within a suit, *i.e.,* litigating before the malpractice jury the underlying case that was never tried." *Id.*

In *Pedro v. Gallone*, 2002 WL 1489618 (Mass. Super.), the Superior Court of Massachusetts held that the trial within a trial was not necessary in the determination of damages in a claim for failing to communicate a settlement offer. The Court determined that "the 'opportunity to settle the case for a reasonable amount without a trial' is itself a valuable right which may be lost because of an attorney's negligence." *Id*. at *1. The Court explained that the "client could seek to recover the difference between the lowest amount at which his case probably would have settled on the advice of competent counsel and the amount of the settlement, *id.,* or, as here, the amount of the verdict. *Id.*

In *Kituskie*, *supra*, the Court reaffirmed its prior ruling that "the plaintiff in a legal action should only be compensated for his actual losses." *Id*. at 282. It further held that "it would be inequitable for the plaintiff to be able to obtain a judgment against the attorney which is greater than the judgment that the plaintiff could have collected from the third party; the plaintiff would

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[11] This is also the rule in California. *Herrington*, 107 Cal.App.4th at 1057.

be receiving a windfall at the attorney's expense." *Id.* at 283, quoting *Kituskie v. Corbman,* 452 Pa.Super. 467, 473, 682 A.2d 378, 382 (1996).

PUNITIVE DAMAGES

The case of *Ferguson v. Lieff, Cabraser, Hiemann & Bernstein, LLP*, 30 Cal.4th 1037, 135 Cal.Rptr. 2d 46, 69 P.3d 965 (2003) is one of the most significant cases in the development of the trial-within-a-trial method. In this case, the plaintiffs, objectors to a class action settlement, filed suit against class action counsel for dismissing the class action punitive damages claim with prejudice as part of the settlement agreement. The Supreme Court of California held that “legal malpractice plaintiffs may not recover lost punitive damages as compensatory damages.” *Id.* at 1045. The Court reasoned that “public policy considerations strongly militate against allowing a plaintiff to recover lost punitive damages as compensatory damages in a legal malpractice action.” *Id.* at 1046. The Court enumerated five public policy considerations in support of its ruling: (1) “allowing recovery of lost punitive damages would defeat the very purpose behind such damages”[12]; (2) “permitting recovery of lost punitive damages would violate the public policy against speculative damages”[13]; (3) “the complex standard of proof applicable to claims for lost punitive damages militates against the recovery of such damages”[14]; (4) “allowing recovery of lost punitive damages in this case would hinder the ability of trial courts to manage and resolve mass tort actions by discouraging the use of mandatory, non-opt-out punitive damages classes”[15]; and (5) “allowing recovery of lost punitive damages as

[12] *Id.* at 1046.
[13] *Id.* at 1048.
[14] *Id.* at 1049.
[15] *Id.*

compensatory damages in a legal malpractice action may exact a significant social cost."[16] The Court further explained that "[b]ecause legal malpractice plaintiffs are made whole for their injuries by an award of lost compensatory damages, allowing these plaintiffs to recover lost punitive damages would give them an undeserved windfall." *Id*. at 1051 (*emphasis supplied*).[17]

But, in 2002, the United States District Court for the District of Columbia, in *Jacobson v. Oliver*, 201 F.Supp. 2d 93 (D.D.C.2002), held that a plaintiff "may sue to recover as compensatory damages those damages that would have been available as punitive damages in his underlying action." *Id*. at 101. The District Court was not persuaded by the argument that punitive damages are not compensation for injury, but are for deterrence and punishment. *Id*.

TRANSACTIONAL MATTERS

In *Viner v. Sweet*, 30 Cal. 4th 1232, 70 P. 3d 1046 (2003), the Supreme Court of California was presented with the following question:

> When the alleged malpractice occurred in the performance of transactional work (giving advice or preparing documents for a business transaction), must the client prove this causation element according to the "but for" test, meaning that the harm or loss would not have occurred without the attorney's malpractice?

Id. at 1235 (*emphasis supplied*). The Court responded "yes." *Id*. The Supreme Court, in reversing the Court of Appeals, concluded that:

> just as in litigation malpractice actions, a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result.

Id. at 1244. At the trial court level, the trial judge refused defendants' request to instruct the jury on "but for" causation. The jury found the defendants negligent of legal malpractice and

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[16] *Id*. at 1050.

[17] In *Summerville v. Lipsig*, 270 A.D.2d 213, 704 N.Y.S.2d 598 (N.Y.App.Div. 2000), the appellate court unanimously affirmed the trial court's granting of defendant's motion to dismiss of plaintiff's legal malpractice case for depriving the plaintiff the opportunity to seek punitive damages. The Court held that "it was 'illogical' to hold the law firm liable for causing the loss of a claim for punitive damages which are meant to punish the wrongdoer and deter future similar conduct." *Id*.

awarded the plaintiffs $13,291,532. The Court of Appeals reduced the damage award to $8,085,732, affirmed the judgment and "held that the 'but for' test of causation did not apply to transactional malpractice." *Id*. at 1238. The Supreme Court rejected the three reasons stated by the Court of Appeals in its determination not to apply the "but for" test.[18] In explanation of its ruling, the Supreme Court stated that:

> [i]n both litigation and transactional malpractice cases, the crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent. This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative.

Id. at 1242.

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[18] "First, the court asserted that in litigation a gain for one side is always a loss for the other, whereas in transactional work a gain for one side could also be a gain for the other side. Second, the court observed that litigation malpractice involves past historical facts while transactional malpractice involves what parties would have been willing to accept for the future. Third, the court stated that 'business transactions generally involve a much larger universe of variables than litigation matters.'" *Id*. at 1238.