Legal Malpractice: The "Case-within-a-Case" Methodology – A Primer

By Francis V. Cristiano, Esq.

The tenants of a legal malpractice case are well known, i.e., the plaintiff must prove that: (1) the attorney owed a duty of care to the plaintiff; (2) the attorney breached the duty of care; and (3) the attorney's breach of duty to the plaintiff proximately caused the plaintiff's damages.[1] An attorney owes the client a duty to employ a degree of knowledge, skill and judgment ordinarily possessed by the members of the legal profession in representing the client.[2] In making this determination, the court instructs the jury to "compare [the attorney's] conduct with what an attorney, having and using that knowledge and skill of attorneys practicing law at the same time, would or would not have done under the same or similar circumstances."[3]

When the claimed damages involve allegations of either a loss or diminution of value of an underlying claim, however, the malpractice claim requires a "case-within-a-case" analysis where the rules become less certain, and the role of an expert witness is somewhat ill defined.

Basic legal principles to keep in mind with regard to the trial of a case within a case or a "trial within a trial" are: "[T]he trial judge should decide what issues are of law to be decided only by the court and what are of fact to be decided by the trier of fact."[4] "Although the task requires careful analysis, the resolution is determined by how the issues should have been decided in the underlying case or matter."[5] "Issues of law do not become issues of fact for the jury in a legal malpractice action."[6] "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court" as a matter of law.[7] Furthermore, "if causation depends on a legal ruling, the issue usually presents a question of law."[8]

The Colorado Jury Instructions provide initial guidance to the query submitted to the jury of a claim involving an underlying case.[9] The instruction makes it clear that the court must instruct the jury on the law applicable to the underlying case and that the question to the jury during deliberations is whether "the plaintiff should have prevailed in the underlying case" or "underlying claim."[10] (Emphasis added). The word "should" is the almost universally accepted word in the instruction and is not intended to be synonymous with the word "would," although oftentimes the defendants try to advance that idea.

This distinction leads to a potential conflict. Defendants might prefer the use of the word "would." By using "would," they may tout the supposed rule that in the "trial within a trial" phase, a plaintiff must present virtually the same evidence it would have presented in the underlying action. The court instructs the jury that its job is simply to determine the underlying case based upon the evidence presented at the trial, thereby taking the jury's attention further away from the true question of how much damage the attorney's negligence caused, and not the defendant in the underlying case.

A recent court of appeals decision (written by Judge Webb in *Allen v. Martin*[11]) addressed and clarified this issue:

> On the facts presented, we decline to follow the minority view, which assumes that in the "trial within a trial" phase, "[t]he plaintiff must present virtually the same evidence that would have been presented in the underlying action." *Whitley v. Chamouris*, 265 Va. 9, 574 S.E.2d 251, 252 (Va. 2003); *see also Cook v. Cont'l Cas. Co.*, 509 N.W.2d 100, 105, 180 Wis. 2d 237 (Wis. Ct. App. 1993). Here, in contrast to a civil action that was tried but might have come out differently but for alleged malpractice, because Allen's guilty plea avoided a trial, her evidence could show only how the prosecutor might

> have exercised his discretion otherwise.
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> Thus, we conclude that here expert testimony was also required on damages supposedly caused by the breach of fiduciary duty. The question of what effect, if any, Martin's coming forward would have had on the criminal proceedings is far from "clear and palpable." *Boigegrain*, 784 P.2d at 850. The standard of care expert did not opine on how the criminal case would have proceeded differently had Martin talked to the prosecutor, a subject beyond the experience of the jurors. *See Meyer*, 889 P.2d at 516.

This leads to the next part of the analysis. The purpose of the case within a case analysis is to determine what "should have happened" had the attorney not lost or weakened the case due to his or her negligence. The proper analysis probably begins at a point shortly before the plaintiff first feels the effects of the negligence. For example, when the underlying case is a Title VII wrongful employment discharge case, lost because the attorney failed to assure that the case was filed within the permissible time limits (after the EEOC issued a notice to sue), the proper analysis of what should have happened begins shortly before the time expired for the plaintiff to have filed his complaint.

What is important to understand is that such an analysis may require expert testimony, because the jury may not be qualified to determine without expert legal guidance how the case should have proceeded from that point forward. As stated by Judge Webb in *Allen*:

> [a]lthough not resolved in Colorado, most jurisdictions have concluded that causation in a legal malpractice action must be proved by expert testimony, unless causation is within the jury's common understanding. …We consider these cases to be well reasoned and consistent with Colorado precedent.[12]

Thus, unless the effects of the attorney's negligence are "clear and palpable," expert witness causation testimony is likely required to establish even a prima facie case of what should have happed after the case was either lost or harmed by the attorney's negligence in the underlying case, even though clearly such testimony would not have occurred in the underlying case. Hence, even where negligence is admitted by the defendant but the effects of the negligence in terms of the probable course of the case thereafter assuming competent counsel, are not "clear and palpable," it is necessary for a plaintiff to endorse a qualified expert to prove causation. In *Allen*, for example, the trial court found the plaintiff's endorsed expert unqualified to testify because of his lack of expertise in securities law. The trial court rendered summary judgment in favor of the defendent, which the appellate court affirmed on the issue of causation because there was no competent evidence that the plaintiff could have presented with regard to what "should have happened."

A significant corollary to this rule, however, is that counsel can use expert testimony only to describe what the proper course of events would have been in the underlying case given competent counsel. It is not proper, however, for the expert to opine as to what the ultimate result would have been, "since that does not involve the expertise of a lawyer witness."[13] "No evidence can predict the decision of a jury, and therefore, the former cannot be the subject of expert testimony."[14] Instead, in the malpractice case, the jury exclusively determines that portion of the inquiry. The court instructs it to determine whether the plaintiff "should have prevailed in the underlying case" based upon the instructions given to the jury, which the jury received in the underlying case.[15]

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Endnotes

1 *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005); *Stone v. Satriana*, 41 P.3d 705 (Colo. 2002); and *Luttgen v. Fischer*, 107 P.3d 1152 (Colo. App. 2005). *See also*, 4 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice, § 34 at pp. 1114-6, and CJI-Civ. 15:18.

2 *Hopp & Flesch, LLC v. Backstreet*, 123 P.3d 1176 (Colo. 2005); *Rantz v. Kaufman*, 109 P.3d 132; *Stone v. Satriana*, 41 P.3d 705 and *Bebo Constr. Co. v. Mattox & O'Brien*, 990 P.2d 78 (Colo. 1999).

3 C.J.I.-Civ. 15:21.

4 Mallen and Smith, §34:15 at 1129.

5 *Id*.

6 *Id*. at 1129-30.

7 CRE 104(a); *see also Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.2d 571, 590, 621 (Colo. 2004); *People v. Sanchez*, 180 Colo. 119, 122, 503 P. 2d. 619, 621 (1972); *People v. Preciado-Flores*, 66 P.3d 155, 164 (Colo. App. 2002).

8 Mallen and Smith, §34:15 at 1140.

9 CJI-Civ. 15:20.

10 *Id*.

11 *Allen v. Martin*, 203 P.3d 546 (Colo. App. 2008).

12 *Id*. at 569.

13 *See e.g*., *Whitley v. Chamouris*, 265 Va. 9, 574 S.E. 2d 251 (2003).

14 *See Cook v. Continental Cas. Co*., 180 Wis. 2d 237, 509 N.W. 2d 100 (Ct. App. 1993).

15 *See* C.J.I.-Civ. 15:20.