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# Defending a “Case Within a Case” Legal Malpractice Action

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## Executive Summary

Defending legal malpractice matters brought in the manner of a “case within a case” often brings unique challenges not typically found in other professional liability cases. The plaintiff must prevail in two cases: the legal malpractice case and the underlying action. This can result in significant discovery and multiple experts being utilized. The nature of a case within a case malpractice action requires the defense attorney to become an expert on all issues pertaining to the underlying action. For instance, when defending an attorney who was sued for negligently prosecuting a medical malpractice action, the defense attorney must learn everything there is to know about the underlying medical issues. The earlier in the litigation process that defense counsel masters the underlying issues the better. This is particularly important where the underlying action involves issues infrequently seen by the defense attorney handling the legal malpractice defense.

Often times, defense counsel will face an uphill battle in that the defendant handling the underlying action made obvious legal errors, but defense counsel may still end up prevailing if he can successfully defend the underlying action. If the plaintiff cannot prove his case in the underlying action, then the legal malpractice action also fails. Thus, defending the underlying action results in a role reversal for the attorney being represented. He may have believed that he had a good case when he prosecuted the underlying action, but a good defense attorney must build a case demonstrating the opposite, that the underlying action would not have prevailed. It is not uncommon that the underlying action was dismissed early in the litigation, before any significant discovery could be accomplished. This allows the defense attorney to shape the direction of the underlying action through discovery. Accordingly, crafting a well thought out defense strategy in the underlying action early in the representation of the legal malpractice action is imperative.

Numerous legal factors can also influence the overall litigation strategy. Judges may rule on specific legal issues in the underlying action that impacts the outcome. Because of these legal considerations, often times legal malpractice cases are decided early on in motions to dismiss or at the summary judgment stage. For example, statute of limitations issues frequently arise in a case within a case legal malpractice matters, whereby the attorney handling the underlying matter allegedly filed the action after the applicable limitations period expired. However, a determination of the date in which the statute of limitations accrued can be a difficult determination. Another legal factor that frequently arises pertains to the scope of the underlying counsel’s representation. An attorney may avoid legal malpractice liability if the alleged duty breach was not within the scope of the attorney’s representation.

This chapter provides an overview of the key areas to assess when defending a case within a case legal malpractice matter. It also offers strategies that defense counsel should consider using in the defense of such actions.

Given the case within a case nature of these cases, they can result in lengthy and costly litigation. Accordingly, it is important to gain an early understanding of the likelihood of success so that the client can be properly advised of his options. Generally, the legal malpractice allegations are easier to assess than the underlying action. Often times it will be apparent at the outset of the case whether the attorney being sued for legal malpractice made costly errors in his handling of the underlying action. However, the question still remains whether the plaintiff would have ultimately prevailed in the underlying action but for the attorney's negligence. Thus, I do an immediate and thorough assessment of the underlying action, and will often commence discovery on the underlying action first. This entails obtaining an expert to consult on the underlying action early in the litigation process. It also entails obtaining all court pleadings and relevant documents, and identifying the key witnesses to depose in the underlying action who will likely offer testimony that may influence the outcome of the underlying action. The other reason it is important to quickly analyze the underlying action is to determine what the potential damages will be in the event liability is found. The client will want to know early in the litigation what the case is worth so that it can make an early and informed judgment on whether to attempt to settle or to place the case in a defense posture.

### **Assess the Underlying Action**

The focus of the legal malpractice action is on the underlying matter, or the case within the case. Irrespective of the attorney negligence component, the plaintiff is required to prove that he would have been successful in his underlying action in order to prevail in the legal malpractice action. Legal malpractice actions are, by their very nature, lawsuits dependant upon the success of the underlying action. Legal malpractice cannot exist unless the attorney's negligence in the underlying action resulted in the loss of the underlying action. Thus, a thorough and early assessment of the issues in the underlying action is critical to the defense of the legal malpractice action. In other words, the attorney must step into the shoes of the defense attorney in the underlying action and do everything that a well prepared defense attorney would have done to investigate the allegations and build a defense to the case. Even if the client's liability is apparent in that the attorney committed legal malpractice, if the underlying case can be shown to be weak, the plaintiff will have a difficult time meeting his burden of proof.

Frequently, the underlying action involves a claim that the handling attorney failed to timely file the underlying action. Another type of claim commonly seen involves allegations that the handling attorney improperly prosecuted the underlying action in some way, such as failing to comply with court rules, discovery rules, or civil procedure that resulted in a key witness or evidence being barred. Another example is where the attorney failed to communicate a settlement offer to his client. In defending these types of actions, the defense attorney should first obtain his client's entire file. He should also obtain the

court file in the event that something is missing from the client's file. Counsel should also subpoena the records of any other attorney who may have had the file, such as a successor counsel if applicable. Additionally, defense counsel should obtain all records and documents pertaining to the occurrence at issue in the underlying matter. For instance, where the underlying action was a personal injury matter, all medical records, employment records, and any accident or police reports should be obtained. If the underlying action was a medical malpractice matter, all medical records prior to and subsequent to the alleged medical malpractice at issue should be obtained, as well as expert reports that were prepared. Similarly, if the underlying action was an accounting malpractice action, all accounting records, any applicable tax documents, and transcripts from administrative hearings or administrative rulings should be obtained. If the underlying action was a product liability action, all documents pertaining to the product at issue should be, and if possible the product itself should be obtained or preserved. Defense counsel should also obtain any deposition transcripts that may be available in cases where discovery took place.

After obtaining the pertinent records and applicable transcripts, defense counsel should interview all the relevant witnesses in the underlying matter and/or determine which witnesses to depose. Counsel should also retain an expert to analyze the underlying matter. Thus, if the underlying action was a medical malpractice case, a medical expert in the same or similar field as the medical defendants should be retained to assess the underlying action. The medical expert should be given all of the medical records, the complaint, and any expert reports, as well as any deposition transcripts if applicable.

In a strange twist, the materials provided to the expert could also include reports prepared by the expert retained by the defendant attorney when he handled the underlying matter. This could result in an expert opinion that contradicts the opinion of the original expert retained in the underlying matter. The plaintiff will undoubtedly use such a contradiction against his former counsel in building his case in the legal malpractice action. For example, some states require that a medical expert prepare a report in support of an initial pleading in a medical malpractice case to indicate that there is a reasonable and meritorious basis for filing the medical malpractice action. The plaintiff will likely point to the fact that his former counsel and the expert retained by his former counsel believed that the medical malpractice action had merit, and but for the negligence of his former counsel, he would have prevailed in the action.

In light of this potential contradiction among experts that the defendant attorney used, first in the underlying action and later in his own defense in the legal malpractice action, defense counsel must carefully craft an argument that demonstrates why the original expert's opinions in the underlying action must be given little or no weight. In cases where an expert report exists in the underlying action but no discovery took place because the case was dismissed very early in the litigation, the original expert's report could be discredited to some degree in that it was based on an incomplete picture. The original expert

did not have the benefit of reviewing all of the discoverable evidence, including important deposition testimony of the parties and treaters, whereas the expert retained in the legal malpractice action can review all of these materials as discovery progresses. This will be an important distinction to make at the time of trial and will assist the defense attorney in explaining to the jury why the original expert's report must be given less weight than that of the new expert.

It is also important to note that the defendant attorney is not bound in the legal malpractice action by the underlying pleadings, expert reports or anything else that was prepared for the plaintiff while the underlying action was ongoing. Thus, the fact that the defendant attorney may have believed that he had a viable action is not a judicial admission in the legal malpractice action. The defendant attorney is permitted to contest the validity of the underlying case.

Ultimately, a good understanding of all of the issues in the underlying case is crucial to success in the legal malpractice case. If plaintiff has strong legal malpractice arguments, all may not be lost if there are holes in the plaintiff's case with respect to the underlying action. Defense counsel needs to be thinking about how to defeat the allegations in the underlying action from the moment the legal malpractice case is filed.

### **Considerations When Responding to Plaintiff's Complaint**

A plaintiff in a legal malpractice case must plead and ultimately prove the following elements: (1) there is a duty owed to the plaintiff by his former counsel; (2) the defendant breached that duty; (3) the breach proximately caused the plaintiff injury; and (4) damages occurred. To prevail on elements two and three, the plaintiff must also prove all of the elements of the underlying action. This can be a heavy burden for plaintiff, and often times the defendant in the legal malpractice action will have arguments to make in his responsive pleading demonstrating that plaintiff cannot state a claim.

Because the legal malpractice action involves the pleading of two cases, sometimes it is not possible for the defendant to respond to all of the allegations within the time allotted by the rules of civil procedure. Accordingly, defense counsel should request additional time to file a responsive pleading if necessary so that the proper investigation and analysis of the allegations can be made. This entails, at a minimum, obtaining and reviewing the complete file in the defendant's possession and all relevant documents in possession of the parties pertaining to the underlying action.

After the proper investigation has been made, the defense attorney is in a position to sort out threshold legal issues that may be addressed as a matter of law. Such issues may be raised at the beginning of the case through a motion to dismiss. For instance, the defense attorney should consider bringing a motion to dismiss for failure to state a claim if the plaintiff has failed or otherwise cannot plead sufficient facts establishing that the alleged legal malpractice proximately

caused damages to plaintiff. It is plaintiff's burden to plead and ultimately prove that the loss of the underlying action was the proximate cause of the defendant's legal malpractice. Accordingly, in the complaint, the plaintiff must sufficiently plead *how* he would have been successful in the underlying action. If he cannot do so, the defense attorney should bring a motion to dismiss for failure to state a claim. It is not enough for the plaintiff to only make allegations of attorney negligence without making factual allegations demonstrating that his former counsel's negligence proximately caused the adverse result in the underlying action.

For example, the defense attorney should consider a motion to dismiss for failure to state a claim where the defendant failed to file a motion that plaintiff alleges should have been filed in the underlying action, but the motion had little chance of prevailing. Similarly, a motion to dismiss for failure to state a claim should be considered where the defendant failed to timely file an action, and as such plaintiff's action was time barred, but the litigation was fruitless and it was apparent on its face that plaintiff would not have succeeded. Another example is where the defendant failed to timely serve a party to the action, but other parties were properly served, and the successor counsel decided to pursue the legal malpractice action instead of proceeding with the viable underlying action against the parties that were timely served.

A motion to dismiss for failure to state a claim may arise where the plaintiff's negligence claims are based on the professional judgment and/or strategic and tactical decisions of his former counsel during the underlying action. Attorneys have latitude to make strategic decisions regarding how to prosecute or defend a case based on their exercise of professional judgment. Such tactical decisions may include the retention of or failure to retain a particular expert, calling or failing to call a particular witness at trial, choosing a certain venue, or failing to object to a jury instruction proposed by the opposing party. Ultimately, defense counsel should move to dismiss allegations that are really nothing more than the plaintiff's disagreement over the litigation or trial strategy.

A motion to dismiss for failure to state a claim may also arise where the alleged damages are too speculative. Damages in legal malpractice actions cannot be based on speculation. Thus, it could be argued in a motion on the pleadings that a plaintiff who sues his former counsel for negligently filing an action in a jurisdiction that is known to be less sympathetic to plaintiffs, as opposed to another potential jurisdiction, cannot state a claim because the damages are too speculative. Similarly, it could be argued that a plaintiff's action against his former counsel for negligently deciding to proceed to trial by jury instead of a bench trial (or vice versa) should be dismissed on grounds that the alleged damages are too speculative.

While motions to dismiss for failure to state a claim are the most common, another potential motion to consider on the pleadings is where plaintiff has plead duplicative claims, such as breach of contract, tort, and/or breach of

fiduciary duty. Pleading in the alternative is allowed in most jurisdictions, but courts will often grant dismissal of a claim plead in the alternative if it is by nature duplicative of the primary claim. For instance, if the facts, legal duty and damages are the same for the negligence claim based on tort as with the alternative breach of contract or breach of fiduciary duty claims, defense counsel should move to dismiss the other claims.

One other option that the defense attorney might consider at the pleadings stage, depending upon the facts of the case, is to stipulate to the attorney's negligence in the legal malpractice action but deny the allegations of proximate cause and damages. This option should be considered only where the attorney's negligence is patently obvious, but the defendant can still prevail by defeating plaintiff's case within the case. By stipulating to the attorney's negligence under such a scenario, unnecessary litigation costs and expenses will be avoided and the case will be streamlined such that the parties will essentially litigate just the underlying action.

### **Formulate Affirmative Defense Arguments**

Defense counsel must determine whether any affirmative defenses should be plead at the time of filing an answer to the complaint. Alternatively, defense counsel may be able to raise a motion to dismiss at the pleadings stage based on affirmative matter that defeats the complaint as a matter of law. This may be difficult to accomplish, as many judges will find that issues of fact exist and it is premature to rule. If defense counsel is unsuccessful in dismissing the case on the pleadings based on affirmative matter, a motion for summary judgment should be brought following completion of the requisite discovery.

For instance, a motion to dismiss and/or affirmative defense based on expiration of the legal malpractice statute of limitations may be applicable. In most jurisdictions, the legal malpractice statute of limitations is two years from the time plaintiff knew or reasonably should have known of the injury for which damages are sought. The date of final judgment and dismissal of the underlying action is generally when the legal malpractice action accrues. Also, the limitations period on a legal malpractice action can be deemed to have begun where plaintiff terminates the defendant as his counsel and retains a successor attorney. However, the issue of when the plaintiff reasonably should have known of his injury and that it was caused by the attorney's acts or omissions is often factually disputed, and thus is dependent upon the relevant records and testimony in the case. Accordingly, statute of limitations defenses are frequently re-visited at the summary judgment stage.

It is not always apparent as to when the plaintiff's legal malpractice claim accrued. This issue is frequently the primary issue in the action. A plaintiff's knowledge of the facts forming the basis of the action, rather than knowledge of the legal theory upon which the action is brought, is the critical determination. Another critical determination is when the plaintiff discovered that he suffered

some damage as a result of the defendant's legal actions. Once some injury has occurred, the statute of limitations begins to run, even if the plaintiff continues to suffer some additional injury. In other words, the plaintiff need not know the full extent of the nature of his injuries for the statute to begin to run. Although these issues are generally questions of fact, they may be decided as a matter of law in the defendant attorney's favor where the undisputed facts show that the plaintiff discovered or reasonably should have discovered the attorney's negligent conduct and the initial damage occurred as of a specific date and plaintiff failed to file the legal malpractice action within 2 years of that date.

Although statute of limitations issues tend to predominate, there are other potential affirmative defense arguments that might apply. Res judicata and collateral estoppel defenses should be raised where the underlying action or controversy has been decided on the merits. Thus, a prior position taken by plaintiff in the underlying matter that was ruled upon against plaintiff or a judgment against plaintiff will operate as a bar to plaintiff making the same argument in prosecuting his legal malpractice action. As with statute of limitations issues, these issues are often decided at the summary judgment stage.

"Unclean hands" can be raised as an affirmative defense argument where the plaintiff chose to put himself in a position of questionable, unethical, or illegal conduct in retaining or seeking advice from an attorney to further plaintiff's questionable plans. Accordingly, courts will generally dismiss a legal malpractice action where the plaintiff seeks damages resulting from the attorney's alleged conduct that was the product of plaintiff's unclean hands.

Affirmative arguments can also be raised based on a ruling that likely would have been obtained in the underlying action. So often the underlying action forming the basis of the legal malpractice case did not progress very far in discovery, and thus, no substantive rulings were made in the underlying case. However, during the legal malpractice litigation, as discovery progresses on the case within the case, certain substantive issues may result in a court ruling that will have a direct impact on the legal malpractice action. For example, where the underlying action is an accounting malpractice case, if the discovery shows that the plaintiff cannot prove that his accountant proximately caused damage stemming from adverse tax decisions, a dispositive ruling likely in the form of summary judgment would have been granted in the accountant's favor. If the court in the legal malpractice action recognizes that such a ruling would have been made, then plaintiff's legal malpractice case also fails.

As noted previously, errors in judgment can form the basis of a defense. Such an argument could be plead as an affirmative defense. In fact, many jurisdictions recognize judgmental immunity defenses. Where the defendant attorney's judgment, strategy, or discretion is being attacked by plaintiff, the judgmental immunity argument may apply.

### **Assess the Legal Duty of the Defendant**

One of the primary assessments that should be made in defending a legal malpractice action is whether the defendant had a legal duty to plaintiff as specifically alleged in the complaint. For a duty to exist, there must be an attorney-client relationship with respect to the particular issue raised in the complaint. Assuming a duty exists, the defendant attorney owes the plaintiff client a duty to exercise the degree of knowledge, skill and judgment ordinarily possessed by other lawyers who provide the same or substantially similar services for their clients. The breach of a duty of care constitutes legal malpractice. Similarly, an attorney owes the client a duty of undivided loyalty and confidentiality, the failure of which results in breach of a fiduciary duty.

An attorney-client relationship is shown where there is evidence that the client sought and received advice of the defendant attorney. The relationship can be created in writing in the form of a retention agreement, or it can be oral or otherwise inferred from the conduct of the parties. The most determinative factor is whether the client believed that a relationship existed. Thus, while it is not generally required that a retention agreement be formed in writing, it is preferable because it can lay out the terms of the attorney's representation. Where there is no written retention agreement, correspondence and e-mail may assist the defense attorney in gaining an understanding as to whether there was an attorney-client relationship and/or the nature and extent of one. Ultimately, if defense counsel can demonstrate that an attorney-client relationship never existed, the defendant should prevail in the legal malpractice action.

Even if an attorney-client relationship existed, the defendant may still prevail if it can be shown that the allegations of attorney malpractice are outside the scope of the defendant's representation of plaintiff. Thus, if the defendant's representation of plaintiff was confined or limited in some way, and the defendant is later accused of failing to do something that he was not asked to do or otherwise made clear to plaintiff that he would not agree to do, then the defendant may have an argument that he cannot be held accountable to plaintiff for negligent representation.

The attorney has the duty to inform his client about the scope of his representation. An attorney may limit the objectives of the representation if the client consents after disclosure. If there is a written retention agreement, the defendant will have documentary evidence delineating exactly what the nature and scope of the representation was. If the scope of the representation was limited in the written retention agreement, defense counsel will be able to point to the written agreement as irrefutable evidence of the limitation. However, many legal malpractice actions arise as a result of the lack of a written retention agreement whereby the plaintiff and the defendant disagree with one another about the scope of the verbal retention agreement. This typically results in an issue of fact over the specific scope of the defendant's representation. For instance, if the defendant told plaintiff that he would only represent him in a particular action but would not represent him in another, then he would not

have a duty to counsel plaintiff as to matters pertaining to the other action, such as when the statute of limitations expires. Unfortunately, without a written retention agreement, one can anticipate that plaintiff will deny that the defendant explained this limitation to him, resulting in a “he said, she said” situation.

Another duty assessment arises when the plaintiff retained the defendant attorney for a limited purpose, thereby limiting the scope of the representation, and the defendant fails to advise the plaintiff regarding a collateral issue. In certain circumstances, the defendant may have been required to counsel the plaintiff on the collateral issue even though the scope of representation was limited. For instance, an attorney retained to represent a plaintiff in a workers’ compensation action only may still have a duty to advise his client as to the applicable statute of limitations in which to file a personal injury action stemming from the same occurrence and injury. Accordingly, although the attorney may not be required to represent his client on matters that are beyond the scope of his representation, he may still be required to advise his client of the need to obtain other legal assistance or to advise the client on indirectly related issues.

An attorney’s duty is a question of law, but issues pertaining to the scope of representation are typically deemed issues of fact. In light of this, where there is a question about the scope of the attorney’s representation, it is important for defense counsel to accumulate evidence demonstrating that the scope of representation was limited and as such the attorney did owe plaintiff a duty.

### **Discovery Strategy**

Defense counsel should obtain as early in the litigation as possible all records, documents and evidence, as well as identify key witnesses. During the written discovery phase of the litigation, defense counsel should request the following:

- Produce any and all statements of any witness to the allegations plaintiff has or had against the defendant in the underlying action
- Produce any and all statements of any witness to the allegations and/or damages alleged in the legal malpractice action
- Produce any and all documents, including but not limited to correspondence, e-mail, notes, etc., regarding any communication between plaintiff and defendant
- Produce any and all documents, including but not limited to correspondence, e-mail, notes, etc., regarding any communication between plaintiff and successor counsel

- Produce any and all documents that plaintiff believes supports the allegations in the complaint as to the defendant
- Produce any and all documents that plaintiff believes supports the allegations he had against the defendant in the underlying action
- Produce copies of all tax returns or other evidence of income for a five-year period prior to the date of the alleged occurrence at issue
- Any and all documents pertaining to the damages that plaintiff claims have been incurred as a result of the alleged legal malpractice of defendant
- All documents, demonstrative exhibits, and evidence that plaintiff intends to submit at trial
- All expert reports from retained experts who will testify at trial
- Any and all correspondence, e-mail, agreements, contracts and/or engagement letters between plaintiff and defendant relating to the underlying action that define the scope, terms, conditions and limits of the representation
- Any and all correspondence, e-mail, agreements, and/or engagement letters between plaintiff and successor counsel regarding the underlying action
- Any and all correspondence, e-mail, agreements, and/or engagement letters between plaintiff and prior counsel who represented plaintiff in any legal matter, including but not limited to the underlying action
- Any and all correspondence, e-mail, and communications between plaintiff and other counsel who communicated with plaintiff regarding the underlying action
- Any deposition or trial transcripts of plaintiff in other matters
- Any insurance files pertaining to the claim in the underlying litigation
- A list of all witnesses who have knowledge regarding the occurrence alleged in the underlying action
- A list of all witnesses who have knowledge regarding the allegations in the legal malpractice action
- Depending upon the nature of the underlying action, interrogatories and production requests applicable to that type of case should be issued

(ie. in medical malpractice actions, issue medical malpractice interrogatories)

- Any and all documents either referred to in plaintiff's answers to interrogatories or relied upon in answering the interrogatories

Upon receiving responses from plaintiff to all written discovery requests, defense counsel should issue document subpoenas to all prior and subsequent counsel for their files. It is possible that these other counsel will claim a privilege and may refuse to honor the subpoena. However, every effort should be made to obtain such documents. Discovery of communications between the plaintiff and other counsel may show that another attorney played a role in causing the plaintiff's loss. To obtain documents of other counsel, one argument that can be made in response to an anticipated privilege claim is that plaintiff's actions constitute an implied waiver of the attorney-client privilege. Thus, the privilege holding plaintiff waives the protection that the privilege provides him by filing a legal malpractice action. In other words, the plaintiff has opened the door for the defendant to obtain the files of other attorneys who have represented him. As in medical malpractice matters where a plaintiff has placed his medical care and condition at issue, thereby allowing the defendant to obtain all of the plaintiff's medical records from other medical providers, the legal malpractice plaintiff has implicitly waived his attorney-client privileges.

Courts try to balance the competing interests of attorney-client privilege and the desire to get to the truth in the legal malpractice action. The file of prior counsel is generally easier to obtain than the file of successor counsel. Frequently, the successor counsel represents the plaintiff in an area that is related to the underlying action of the legal malpractice case. Some courts side with the successor counsel who refuses to honor a document subpoena on grounds that requiring the successor counsel to respond to the subpoena would undermine the purpose of the privilege and would discourage communication between attorneys and their clients. However, in situations where the plaintiff communicated with other counsel that counseled the plaintiff during the time period in which the legal malpractice occurred, courts generally find that the privilege as to the other counsel was waived. Ultimately, defense counsel can anticipate a fight over any request for documents in the possession of other attorneys.

In order to better formulate the defense theory in the underlying matter, defense counsel should retain an expert to review the underlying action as soon as possible and disclose the expert as a retained expert at the appropriate time in discovery. Similarly, if the defendant is contesting the legal malpractice allegations, defense counsel should retain an attorney to serve as an expert to respond to the specific allegations of legal malpractice. It is important that both experts be provided all of the relevant documents, records, depositions, and materials so that they can make fully informed opinions based upon the entire record. Case within a case legal malpractice matters can be expert intensive

affairs. As with any case involving a battle of the experts, it is important that knowledgeable experts with strong backgrounds on the particular issues in the underlying action and the legal malpractice action respectively are retained.

### **Assess Whether Blame Can Be Placed on Successor Counsel**

In matters where the plaintiff retained a successor counsel to the defendant, defense counsel should assess whether any or all of the blame for the plaintiff's alleged damages can be placed on the successor counsel. In many jurisdictions, where the conduct of a successor attorney constitutes an independent and superseding cause of plaintiff's damages, the discharged attorney cannot be found to have committed legal malpractice. For example, a successor attorney's failure to re-file a suit within one year of the entry of a dismissal for want of prosecution may constitute the independent and superseding cause of the plaintiff's damages, thereby precluding a claim against the predecessor counsel for allowing the action to be dismissed for want of prosecution. Similarly, a successor attorney's failure to voluntarily dismiss an action and re-file it where the preceding counsel failed to obtain service on all the defendants may constitute the independent and superseding cause of the plaintiff's damages. However, not all jurisdictions permit the defendant to place the blame on successor counsel, citing public policy reasons.

In jurisdictions where the superseding cause argument can be used by the defendant in a legal malpractice action, a key determination in assessing successor counsel liability is whether the underlying action was still viable when successor counsel replaced the defendant. Thus, in cases where the successor counsel has sufficient time to protect the plaintiff's rights, the discharged counsel generally should not be liable in legal malpractice. In such situations, defense counsel should argue that the proximate cause of the damages sustained by the plaintiff was not the alleged legal malpractice of the defendant, but rather, the intervening and superseding failure of the plaintiff's successor attorney to preserve and fulfill the plaintiff's interests in the underlying action.

In some jurisdictions, rather than looking at whether the underlying action was viable when successor counsel took over the case, the courts assess whether the successor counsel's negligence was reasonably foreseeable. If successor counsel's negligence was reasonably foreseeable, the defendant as predecessor counsel will not be relieved of the consequences of his own negligence. On the other hand, if successor counsel's mistakes were highly unusual or extraordinary, then successor counsel's actions will be deemed a superseding cause. These determinations are nearly always issues to be determined by the trier of fact.

### **Assess Damages**

In legal malpractice matters involving a case within a case format, the plaintiff's injury is not a personal injury, but rather a pecuniary injury to an intangible property interest caused by the defendant's negligence. The existence of actual

damages is essential to a viable legal malpractice action. Punitive damages are not allowed in legal malpractice actions. Ultimately, the plaintiff will seek a monetary damages award that fairly and accurately represents the amount that the plaintiff would have been entitled to receive had he been successful in the underlying action. Accordingly, as previously pointed out, defense counsel will need to assess all aspects of the underlying action, and must pay particular attention to the underlying case value.

For example, if the underlying action was a personal injury action, medical malpractice action or products liability action, defense counsel can anticipate that the damages sought will be a monetary amount representing recovery of past and future medical expenses, pain and suffering, disability and disfigurement, loss of a normal life, lost wages, etc. If the underlying action was an accounting malpractice, defense counsel can anticipate that plaintiff will seek damages in an amount commensurate with the tax penalties and consequences and/or pecuniary loss that resulted from the alleged accounting malpractice.

It is important to assess the damages aspect of the case as soon as possible, based upon the information readily available to defense counsel, in order to weight the costs and expenses of litigation with the damages that plaintiff may ultimately be entitled to. However, defense counsel will likely need to obtain documents and information in discovery to gain a full understanding as to the potential value of the underlying action.

## **Trial Strategies**

Legal malpractice actions infrequently proceed to trial. In many instances, rulings as a matter of law made at the pleadings stage or later on at summary judgment will ultimately decide the case. However, in the event that a case does proceed to trial, certain tactical decisions must be made by defense counsel. To begin with, at the outset of the case, defense counsel should determine whether to seek a jury trial and file a jury demand with the court, or to seek a bench trial. One school of thought is that juries are skeptical of attorneys and may have significant biases against them; thus, it is preferable to proceed with a bench trial. Others believe that juries have difficulty with complicated legal matters, and that the judge in a bench trial is better able to sort through those issues and reach a favorable verdict. However, many attorneys prefer a jury trial to a bench trial, with the knowledge that the judge will still play a major role in the outcome of the case based on the evidentiary and legal rulings from the bench. A jury trial precludes the judge from having complete and total power to decide the outcome of the case, thereby leading to a more balanced approach. However, even if defense counsel decides to proceed with a jury trial, it is the trial judge rather than the jury that decides the legal issues in the legal malpractice action. Disputed issues regarding the breach of the standard of care are proper for a jury to decide based on the evidence that is submitted, but questions regarding duty itself are determined by the judge.

The next question that must be addressed is whether the case can be streamlined for purposes of trial by stipulating to key facts or even elements of the case. For instance, where the plaintiff has an airtight negligence claim against the defendant attorney in the legal malpractice action, defense counsel should strongly consider stipulating to negligence at trial, while contesting the remaining elements of the legal malpractice action. The parties would then essentially try the underlying action. If the trier of fact determines that the plaintiff would not have prevailed in the underlying action, then the trier of fact must find the defendant attorney not guilty in the legal malpractice action.

If both the underlying action and the legal malpractice action are to be tried, then a tactical decision should be made with respect to which case should be addressed first. However, given that plaintiff presents his case before the defendant attorney, it may be difficult for defense counsel to steer the direction of the trial with respect to the order in which the case is presented. If the defense to the underlying action is stronger than the defense to the legal malpractice aspect of the overall case, then perhaps defense counsel should make every effort to influence the court to allow the underlying action to be presented by the parties first. Many judges will be swayed by knowing that if the jury finds that the plaintiff would not have prevailed in the underlying action that the case need not even continue to the legal malpractice case.

Formulating and submitting the proper jury instructions and/or requesting a special interrogatory for the jury to answer in jury trials is also essential. Case within a case legal malpractice trials are complicated for jurors and can be lengthy, and frequently involve complex legal issues, not to mention the particular issues in the underlying action. Thus, it is paramount that defense counsel make these issues as easy as possible for the jury (and for that matter the judge in a bench trial). Proper jury instructions will greatly assist defense counsel in meeting this objective. Similarly, defense counsel must present all applicable and necessary motions in limine. Often this will entail raising the same or substantially similar legal issues that were raised at the pleadings stage and at summary judgment. Many judges will reserve ruling on such issues until after they have heard certain evidence presented at trial. Defense counsel should not hesitate to re-raise legal issues during the trial if he believes that the evidence has influenced important legal questions that were previously decided in favor of the plaintiff.

Additionally, as with any trial, preparation of witnesses is crucial to success in a case within a case malpractice trial. Substantial time should be spent preparing the defendant for trial, and should include mock cross examination sessions as well as preparation on direct exam. Because the defendant is an attorney, sometimes defense counsel fails to do as much prep work prior to trial as they might otherwise do with a non-attorney. This is a mistake. In fact, despite the knowledge base that such defendants bring to trial, many attorneys are rather poor witnesses on their own behalf. As with any other witness who is a party to an action, attorneys who are defending themselves in a legal malpractice action

must prepare at length for trial. It is defense counsel's job to make sure that the defendant is thoroughly prepared.

Defense counsel will also need to subpoena for trial all witnesses who are beneficial to the defense in the underlying action and those witnesses who will assist in the defense of the legal malpractice case. Defense counsel should identify which witnesses to call in the defense's case well in advance of trial and should issue the subpoenas well in advance of trial. That way, in the event that certain witnesses have a scheduling issue, a videotaped evidence deposition can be taken. Since many legal malpractice actions involve other attorneys as witnesses and involve medical providers in the underlying action, the types of witness in case within a case malpractice actions are typically very busy and may be unable to appear live at trial to give their testimony. Thus, many of the witnesses' testimony must be secured by way of evidence deposition.

As previously stated, the battle of the experts is a huge component of both the legal malpractice case and the underlying case. As with the defendant attorney, defense counsel must thoroughly prepare his experts for their trial testimony. If possible, this should include a mock cross-examination as well as an overview of the direct examination. Ultimately, it is defense counsel who must be the quintessential expert on the entire case and must be in position to quarterback his client, experts and key witnesses in his case in chief in order to achieve the desired outcome.

### **If the action proceeds to trial, is it better to proceed with a bench trial or a jury trial?**

Whether to proceed with a jury or the judge depends upon numerous factors, including the likely jury pool makeup, the venue, the background and experience of the judge, and the type of case within a case malpractice action that is proceeding to trial. My goal is to provide the client with all applicable information regarding the factors that go into making such a decision and make a recommendation to the client, but with the knowledge that the client will ultimately make the final decision. For instance, if the action is in a jurisdiction that is known for weak defense juries, that may weigh in favor of a bench trial. However, my client will undoubtedly want to know everything there is to know about the trial judge before deciding to place his fate in the hands of that judge as opposed to a jury.

### **Under what circumstances should other counsel be blamed for the alleged damages stemming from legal malpractice?**

Whenever possible, if another attorney can be blamed for the alleged damages, defense counsel should carefully craft an argument showing that the other attorney was the sole proximate cause of the plaintiff's damages. In instances where successor counsel's conduct is an intervening and superseding cause, defense counsel may be able to position the case for a summary judgment ruling

in his client's favor on grounds that successor counsel caused the injury. However, as explained in Question 3, that does not necessarily entail filing a third party action.

### **Should a third party action be filed against another attorney?**

Although another attorney can be blamed for the alleged damages, I believe it is preferable to avoid third party actions unless the goal is to settle the case as quickly as possible and where bringing another party into the case allows multiple parties to put together a settlement package, thereby alleviating the burden of the defendant. However, if the case is put in a defense posture rather than a settlement posture, I prefer to avoid finger pointing, which only benefits the plaintiff. Bringing a third party action will likely result in the third party defendant placing the blame for the plaintiff's damages back on the defendant himself. The defendant and third party defendant's attacks on one another will make it easier for the plaintiff to prove his case. To avoid finger pointing, I would rather place blame on a third party attorney without naming him as a defendant. This tactic also allows defense counsel to utilize an "empty chair" defense at trial, in which the argument can be made that the sole proximate cause of the plaintiff's alleged damages was the negligence of some other party.

### **Should we stipulate to liability on the legal malpractice negligence element and try the case as to the underlying action only?**

Whether to stipulate that the defendant attorney was negligent depends entirely on how strong the plaintiff's legal malpractice case is against the defendant. If it is apparent that the defendant committed legal malpractice, but there is still an opportunity to prevail by defending the underlying matter, then it is in the best interest of the defendant to stipulate to the attorney's negligence but contest the remaining elements of the action. This also has the effect of streamlining the case. Moreover, it likely prevents the defendant attorney from having to testify at trial. If the defendant is not a very good witness on his own behalf or if the trier of fact would have disliked him, then it is even more important to proceed in this fashion. There is little benefit to contesting negligence of the attorney, other than the attorney's ego and pride, in the grand scheme of things, particularly if the strength of the case lies in the defense of the underlying action.

### **How do we deal with attorney-client privilege issues with respect to the plaintiff's other counsel?**

This is frequently a rather tricky issue. Many times, when attempting to obtain the file of another attorney who also represented the plaintiff, the attorney will refuse to produce his file on grounds that to do so would violate the attorney-client privilege. Similarly, at deposition the other attorney may refuse to answer certain questions, again citing the attorney-client privilege. If either occurs, defense counsel will need to bring a motion to compel or motion for a rule to show cause before the court to force the witness to comply with the discovery or

to answer the deposition questions. The court will weigh the competing interests of the attorney-client privilege with the importance of the information being sought by defense counsel to the legal malpractice action. Defense counsel must always stress to the court that plaintiff opened the door to the defendant obtaining such information from the other attorney by filing a legal malpractice action. Defense counsel must argue that the plaintiff has waived the attorney client privilege by filing the legal malpractice action. These arguments will generally be easier to make when the other attorney represented the plaintiff or had communications with the plaintiff around the same time as the defendant's representation of the plaintiff in the underlying action. However, they are more difficult to prevail upon when addressing the successor counsel.

### **Case Study 1: Case within a case: wrongful death/medical malpractice and likely attorney malpractice**

In this case study, the plaintiff brought suit against the defendant attorney for failing to seek leave of court to amend his medical malpractice/wrongful death action to add a new defendant and for failing to timely file his action against the defendant physician. In the underlying medical malpractice action, the attorney retained an expert who prepared a report outlining the negligence of the defendant physician. However, because the attorney failed to seek leave to amend the action to add a new defendant and because the attorney did not timely file the action, the case was dismissed with prejudice. Plaintiff then brought suit against his former attorney for legal malpractice.

Two significant problems arise out of this fact pattern: (1) there are significant problems with attorney negligence in his handling of the underlying action; and (2) the defendant secured an expert report supporting the merits of the underlying medical malpractice action. With respect to the first problem, a thorough analysis of the pleadings, motions, briefs, and rulings must be made to determine whether the attorney in fact committed malpractice. If the underlying file shows that the attorney failed to properly seek leave of court to amend the complaint and add a new party and/or failed to timely file the action, then the attorney's negligence should be stipulated and the case should be contested as to proximate cause and damages. The case would then be litigated and tried as to the underlying medical malpractice action only.

With respect to the second problem, the plaintiff will likely argue that he would have prevailed in the medical malpractice action as shown by the expert opinions of the defendant's own experts. The plaintiff will essentially adopt the defendant's expert as his own and use the opinions of the defendant's expert against him. However, because the case was dismissed early in the litigation, no substantive discovery took place. Accordingly, a new expert should be retained to assess the underlying medical action, including the liability and causation aspects of the medical malpractice case. The new expert must review all of the medical records, but unlike the originally retained expert, the new expert will also have the benefit of deposition testimony to formulate his opinions. The

defendant physician in the underlying action must be deposed, who will undoubtedly defend his actions in caring for the patient and will testify that at all times he complied with the applicable medical standard of care. All non-party medical providers should be deposed as well, as they may be able to support the care and treatment of the defendant physician and/or have supportive testimony on the proximate cause aspect of the medical case.

## **Case Study 2: Case within a case: accounting malpractice and the statute of limitations**

Under this fact pattern, the plaintiff brought suit against his former attorney for failing to timely file an accounting malpractice action against the plaintiff's accountant. Plaintiff contended that his accountant failed to properly advise him regarding the requirement that he file amended state tax returns following a final Federal decision pertaining to his taxes from the same years. This allegedly resulted in state tax penalties. The final Federal decision occurred more than two years before the defendant attorney was retained to prosecute an accounting malpractice action against the accountant. The accounting malpractice statute of limitations is two years.

In this fact pattern, the defendant attorney may be able to argue that plaintiff cannot meet his burden of proof in the legal malpractice action because the claim against the accountant was not viable at the time plaintiff retained him. The key issue is when the accounting malpractice statute of limitation accrued. Plaintiff will likely point to the fact that the defendant himself believed that the accounting malpractice action was still viable, otherwise he would not have agreed to take the case. However, the defendant can argue that merely taking on a case in which it may be initially unclear as to whether there was a viable underlying action does not, in and of itself, demonstrate that the action was viable. The communications between the plaintiff and the defendant will be important in showing what the defendant believed about the viability of the underlying action and what he was saying to plaintiff. If the viability of the accounting malpractice action was in question, it would be helpful to the defense if the defendant attorney communicated to the plaintiff orally, or preferably in writing, his thoughts on the issue.

The primary argument that should be made by the defendant, first in responding to the pleadings and later at summary judgment if the defendant's motion on the pleadings is denied, is that the accounting malpractice limitations period had expired by the time the plaintiff retained the defendant to pursue an accounting malpractice action against his accountant. The defendant can argue that the accounting malpractice statute of limitations accrued when the final Federal tax decision was made, which was more than two years before the defendant was retained by the plaintiff. Defense counsel can anticipate that the plaintiff will argue that he did not discover his injury stemming from the alleged accounting malpractice until the state tax penalties were determined; thus, the statute of limitations did not begin to run until the discovery of this injury. However,

defense counsel should contend that the plaintiff need not realize the full nature and extent of his injury for the limitations period to begin to run. Rather, he only needs to be aware of some injury for accrual to occur. In this instance, the plaintiff was clearly aware that he suffered an injury when the final Federal tax decision was made. The fact that he did not realize the full extent of his injury in the way of related state tax penalties is not relevant. Defense counsel should argue that the plaintiff should have brought his accounting malpractice action within two years of the date of the Federal tax decision. Because he did not even retain the defendant for more than two years after the Federal decision was reached, the accounting malpractice claim was not viable at the time of the plaintiff's retention of the defendant. As a result, the entire legal malpractice action falls apart.

### **Case Study 3: Duty and the scope of representation**

In this case study, the plaintiff brought suit against the defendant attorney for failing to advise the plaintiff regarding his legal malpractice options with respect to the predecessor counsel's alleged legal malpractice in handling an underlying product liability action and for failing to inform him regarding the applicable statute of limitations for legal malpractice actions. The predecessor counsel allegedly waited too long to file the product liability action. The defendant, upon replacing the prior counsel, did not prepare a written retention agreement, but contends that he orally told plaintiff that he would only represent him in the underlying action even though it was questionable as to whether the underlying action was still viable. The plaintiff contends that because the defendant did not advise him regarding the legal malpractice statute of limitations, the limitations period to sue the former attorney expired.

Under this fact pattern, the scope of the defendant's representation is at issue. Here, the problem is twofold: (1) the defendant took over a case, the underlying product liability action, that had questionable viability; and (2) the defendant admits that he did not advise the plaintiff regarding the two year legal malpractice statute of limitations with respect to a potential legal malpractice action against the prior counsel. To begin with, attorneys do not have a duty to prosecute fruitless litigation, so the plaintiff may argue that the defendant should have also advised him regarding his legal malpractice rights, particularly in light of the viability issues with the underlying product liability case. However, many lawyers, for professional reasons, are hesitant to take over a case from a prior attorney and proceed to advise the plaintiff regarding a potential legal malpractice action against the predecessor counsel. In this instance, the defendant should have put in writing, preferably in the form of a retention agreement or at the very least in some written communication, that he would not pursue a legal malpractice action against the prior counsel and that he was limiting the scope of his representation to the product liability action. Had he done this, it would have been clear what the terms of the representation were.

However, all is not lost in the event that a written retention agreement does not exist. If the defendant verbally advised the plaintiff of the scope of the retention and that he was limiting it to the underlying product liability action, then the defendant can still prevail on an argument that he did not have a duty to the plaintiff to advise him regarding a potential legal malpractice action against the predecessor counsel. However, the defendant will need to build his case in discovery, as a motion to dismiss on the pleadings is unlikely to be granted. Instead, the defendant will need to position the argument for summary judgment. The defendant will need to be very specific in describing at his deposition what the scope of the representation was limited to so that it is clear that the plaintiff understood what the scope of the representation was. He will need to thoroughly explain that he explicitly told the plaintiff that he would not represent him in a legal malpractice action against the former counsel and that he would only represent him in the product liability matter. He will need to explain that he told the plaintiff to retain another attorney if it was his intention to bring a legal malpractice action. Defense counsel might also consider sending the plaintiff requests for admission pertaining to the scope of the representation, and of course, the deposition of the plaintiff will be crucial in establishing that the plaintiff knew that the defendant limited the scope of the representation. If defense counsel is successful in demonstrating this, then a good argument can be made that the defendant did not owe the plaintiff a duty to advise him regarding any aspect of a potential legal malpractice action against the plaintiff.

# About James E. Abbott

*Partner*

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**James Abbott** is an experienced commercial litigator and trial attorney, whose practice includes the representation of professionals and businesses. He practices in a wide variety of litigation and trial areas, with an emphasis on professional liability litigation and product liability litigation. He also handles various commercial litigation matters, construction, labor and employment, and municipal matters. In the professional liability area, he has represented numerous professionals, including attorneys, physicians, nurses, dentists, hospitals, pharmacies, nursing homes, accountants, architects, and engineers in malpractice matters. He has also represented directors and officers in various business litigation matters, banks and financial institutions, and churches and clergy. In the commercial area, Mr. Abbott has represented clients in a variety of contract and warranty disputes, real estate disputes, and consumer fraud claims, and has represented businesses in labor and employment disputes including the defense of retaliatory discharge claims, sexual harassment, disability, and age discrimination claims. He has also represented municipalities in Section 1983 claims.

Mr. Abbott's extensive product liability experience includes the representation of companies in toxic tort matters, including asbestos and other mass tort litigation, and toxic mold matters, as well as representation of clients who manufactured or sold pharmaceuticals, medical instruments, automobiles, construction equipment, and various household products.



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