



Legal malpractice: Proving the case- within-a-case



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“There, but for the grace of God, go I.”

Pursuing legal malpractice cases against litigators¹ can be tricky business. We all know the challenges of the practice of law. No one is perfect, and pointing a finger at a fellow member of the Bar can carry with it the risks of tempting fate and alienating friends and neighbors.

Yet, we do not hesitate to seek justice from negligent doctors and other professionals. Why should we flinch, just because the wrongdoer happens to do what we do for a living? We have all chosen to speak for people who cannot speak for themselves, who have suffered losses as the result of the careless actions of others. Is there anyone more deserving of our

help than someone who has been wronged not once, but twice – first by the underlying opponent, and then by the lawyer to whom he entrusted his case?

In addition to helping the aggrieved client, there is also a significant community benefit to be served by holding our fellow lawyers to the standard of care, just like we do in every other case against every other kind of tortfeasor. It can help restore the public’s faith in the legal system to know that lawyers have to answer for their actions, just like everyone else.

That being said, legal malpractice actions have many unique aspects that must be kept in mind at the intake stage when evaluating the likelihood of success. One of the most critical of these is the so-called “case-within-a-case” or “trial-within-a-trial” method for proving legal malpractice. For the uninitiated, it can present many challenges.

The case-within-a-case

As in any tort case², the critical element of a legal malpractice action is causation. This requires that a plaintiff prove the case-within-a-case. (*Mattco Forge, Inc. v. Arthur Young & Company* (1998) 52 Cal.App.4th 820.) This methodology seeks to objectively determine what should have been the result in the underlying proceeding. (*Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal.App.4th 579, 585-586.) Under the case-within-a-case approach, the legal malpractice plaintiff must establish that, had the attorney properly handled³ the underlying case, the plaintiff would have achieved a more favorable result than what was actually obtained. In the absence of such a showing, there is no causation.



The analysis of the case-within-a-case is dependent upon whether the result about which the plaintiff complains was achieved by way of settlement or trial.

Standards relative to trial

To prove that a better result should have been obtained at trial, the matter must be retried in the legal malpractice trial by utilizing the same procedures, rules, evidence, and instructions that would have been applied in the original action. The underlying action must be recreated through the trial-within-a-trial process to resolve the issues of causation and damages⁴, and whether particular evidence is admissible is determined by whether it would have been admissible in the underlying action. (*Kessler v. Gray* (1978) 77 Cal.App.3d 284.) The court must submit the underlying action to the jury by a special verdict with the same instructions that would have been given in the underlying action.

Further practical application of the trial-within-a-trial concept is found in *Mattco Forge, supra*. Mattco retained Arthur Young as an accounting damages consultant and potential expert witness in Mattco's underlying racial discrimination action against General Electric. Mattco was found to have fabricated documents. The court also found that Arthur Young knew the documents were fabricated, yet relied on them in calculating Mattco's claimed damages. The court granted \$1.4 million in sanctions against Mattco. The parties ultimately settled the action. (*Id.* at 829.)

Mattco then sued Arthur Young for malpractice. The lower court rejected Arthur Young's argument that Mattco had to meet the trial-within-a-trial standard. As a result, Mattco's only evidentiary burden in the liability phase of the trial was to show Arthur Young had caused Mattco to suffer "harm." In the damage phase, Mattco merely had to prove its case against General Electric had some "value." (*Id.* at 830.) The jury awarded Mattco \$42 million against Arthur Young.

The appellate court reversed. The court extensively discussed the history of the case-within-a-case methodology, concluding that:

...it is the most effective safeguard yet devised against speculative and conjectural claims in this era of expanding litigation. It is a standard of proof designed to limit damages to those actually caused by a professional's malfeasance. Certainly to date, no other approach has been accepted by the courts.

The court held that the jury instructions allowing Mattco merely to show "harm" and some "value" were erroneous and prejudicial. Instead, the jury should have been instructed that Mattco was required to prove the case-within-a-case. Specifically, Mattco should have been required to prove that: (1) careful management of its lawsuit would have resulted in recovery of a favorable judgment and collection of same; and (2) the actual loss or damage resulted from Arthur Young's negligence. (*Id.* at 844.) The jury's task was to determine what a reasonable judge or fact finder should have done, an objective standard. (See also, *Traveler's Insurance Company v. Leshner* (1986) 187 Cal.App.3d 169, 197 [trial-within-a-trial methodology was appropriate in the context of an insured who alleged he would have prevailed in an underlying antitrust lawsuit if a proper defense had been provided by the insurance company].) It is also important to note that evidence that the court in the underlying proceeding may have erred does not necessarily absolve the attorney of liability, though the defending attorney is permitted to defend himself on the grounds that the court erred and that, if it had ruled correctly, the client would not have suffered damage. (*Kasem v. Dion-Kindem* (2014) 230 Cal.App.4th 1395, 1400-1401.)

As a practical matter, the case-within-a-case framework requires the defendant attorney to step into the shoes of the underlying adversary:

Such a rule can only withstand the test of logic if the misperforming

lawyer is deemed to constitute the same "target," legally speaking, as the original offending defendant. Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine.

(*Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231.)

Standards relative to settlement

Alternatively, proceeding on the theory that a settling plaintiff should have received a better settlement requires a showing that, but for the attorney's errors or omissions, the defendants would have paid the plaintiff more. (*Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518; *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 663 [claim that "but for" attorney's negligence, case would have settled sooner or on more favorable terms rejected as speculative].) This cannot be left to speculation or surmise.

In *Marshak*, an attorney was sued for legal malpractice by a client she had represented in a marital dissolution action. The plaintiff alleged that the defendant attorney had advised him to settle the action for less than it was worth. The trial court granted the defendant attorney's motion for summary judgment, finding that there were no triable issues of material fact regarding the alleged discrepancies in the valuations of various properties at issue. On appeal, the court held that, for the plaintiff to prevail, he had to prove that there would have been a better outcome had the defendant recommended that the plaintiff reject the settlement offer. It was incumbent on the plaintiff to prove what the better outcome would have been. Finding that predicating a claim for damages on the probability that a certain event would have happened will not support a claim for such damages, the court quoted the case of *Agnew v. Parks* (1959) 172 Cal.App.2d 756, 768, for the proposition that



“[d]amage to be subject to a proper award must be such as follows the act complained of as a legal certainty.”

The court further found that the plaintiff had simply alleged that the case was worth more than the amount for which he had settled. He had offered no evidence to establish the value of his case. Even had he done so, however, he would have been unable to prevail:

For he must also prove that his ex-wife would have settled for less than she did, or that, following trial, a judge would have entered judgment more favorable than that to which he stipulated. Plaintiff has not even intimated how he would establish one or the other of these results with the certainty required to permit an award of damages. (*Id.* at 1519.)

Thompson, supra, which is cited in *Marshak*, is another legal malpractice case in which a plaintiff alleged that he would have received more money had the settlement been handled differently. The plaintiff was a minor child who developed a severe infection, resulting in meningitis, while in the hospital after his birth. The minor’s family hired an attorney to bring a medical malpractice case against the hospital. Although the case settled for approximately \$1.8 million, the plaintiffs sued their attorneys because they did not receive a greater settlement. Just as in *Marshak*, the trial court granted summary judgment to the defendants, finding that the plaintiffs’ evidence that they would have received a better settlement had the defendants proceeded more diligently was too speculative to support their claim.

The appellate court agreed with the trial court, finding that, unless a party suffers “appreciable and actual harm, as a consequence of his attorney’s negligence, he cannot establish a cause of action for malpractice.” (*Thompson* at 661.) None of the plaintiff’s evidence did more than

suggest speculative harm, because it did not demonstrate that, but for the attorney’s delay, the underlying case would have settled at all, let alone at an earlier date or for a more significant amount. Put simply, the court found that there was nothing in the record to show that the plaintiffs could establish any actual damages resulting from their former attorney’s alleged negligence. (*Id.* at 663.)

Obviously, proving that the underlying opponent would have settled on more favorable terms had the attorney acted in accordance with the standard of care can be problematic. Scenarios in which this can occur include when an attorney fails to convey a settlement offer or fails to adequately advise the client of the risks of rejecting a settlement offer.

Conclusion

The case-within-a-case requirement certainly presents challenges. More so than in other kinds of cases, evidence can become stale and difficult to obtain through the passage of time. Disgruntled clients⁵ are often motivated by factors that cloud the liability picture; they can be so angry at the lawyer for obtaining an inadequate result that they fail to acknowledge that the underlying case may have had problems. Additionally, the lawyer will have the tactical advantage of both his and the client’s knowledge of the merits of the underlying case. Perhaps most significantly, the expense of essentially having to litigate and try two cases in one can be prohibitive, particularly when the defendant lawyer is likely to be defended by his professional liability carrier.

Nevertheless, a client is entitled to competent representation by her lawyer, and, if she does not receive it and is harmed as a result, she has the right to sue for malpractice. The challenges of prosecuting legal malpractice cases should not stand in the way of the client’s

right to justice. After all, having agreed to undertake the underlying representation in the first place, a lawyer will be hard-pressed in the legal malpractice action to deny that it was meritorious. If his negligence lessened the value of the case, he should have to answer for his failure to obtain the results the client deserved. Only then will the public’s faith in the system be restored.



Winnett

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Endnotes

¹ The focus of this article is legal malpractice cases arising out of underlying litigation, as opposed to transactional malpractice. The California Supreme Court has held, however, that a plaintiff in a legal malpractice case arising in a transactional setting must prove that, “but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result.” (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244.)

² A plaintiff in a legal malpractice case must prove duty, breach of duty, causation, and damages. (*Thomas v. Lusk* (1994) 27 Cal.App.4th 1709, 1716.)

³ Expert testimony is generally required to establish the standard of care for an attorney, unless the common knowledge of a lay person includes the conduct required by the circumstances at issue in the case. (*Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 138.)

⁴ Legal malpractice plaintiffs are not entitled to recover from their attorneys lost punitive damages as compensatory damages. (*Ferguson v. Lief, Cabraser, Hiemann & Bernstein* (2003) 30 Cal.4th 1037, 1045.)

⁵ Legal malpractice plaintiffs are, by their very nature, litigious. It is critical that realistic expectations for the representation be confirmed at the intake stage.

