

Legal Malpractice Claims – Advanced Strategies for Case-Within-a-Case Litigation

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It is not uncommon for a lawyer to take an extreme – albeit defensible – position on behalf of the client, in settlement communications or court documents, or in negotiating a contract. After all, lawyers are advocates. In most instances, it would never occur to the average practitioner to consider that those same statements or positions – argued so passionately on behalf of the client – may ultimately be used against the attorney in a later claim for legal malpractice, brought by the client. In many instances, the question invariably arises as to whether or not positions taken as an advocate on behalf of a client can be used as evidence in a subsequent malpractice action.

Lawyers who prosecute or defend legal malpractice cases generally understand that these claims are often tried using a “case-within-a-case” mechanic.¹ Beyond the general requirement, various sub-issues may complicate the procedure, including: how extensively the underlying matter should be re-litigated, what issues should be subject to judicial versus jury determination, and the difficulties posed attempting to convince a court that may be inclined to view all malpractice cases as the proverbial “battle of the experts” that it must essentially try two matters.² The lawyer prosecuting the malpractice action must invariably address whether statements by the defendant attorney in the underlying action are admissible, if not binding, in the later malpractice case. The lawyer defending that case must determine the most effective way to convince a court that certain issues which appear to have been previously resolved in the underlying matter can (and perhaps must) be revisited as part of the malpractice case. In many instances, defense counsel may face the daunting challenge of having to convince the court or jury that the prior judge or jury were wrong!

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1. See RONALD E. MALLEN, 4 LEGAL MALPRACTICE § 37:86 (2017 ed.).

2. See *id.* at §§ 37:1, 37:150, 37:120.

This article will begin by exploring both the history and fundamentals of causation in legal malpractice cases, before discussing some of the more practical considerations that frequently confront legal malpractice litigants in the later action.³ The latter part will address both the benefits and burdens facing parties who may feel constrained by the record from the underlying matter, as well as discrete issues that commonly arise in the trial of a legal malpractice claim.⁴

INTRODUCTION TO THE “CASE-WITHIN-A-CASE” PROCEDURE

The phrase “case-within-a-case” refers to the construct for evaluating causation in legal malpractice claims.⁵ The requirement to try the case-within-a-case arises from the dilemma caused by the fact that legal malpractice actions, by their very nature, are often highly speculative relative to other negligence-based actions.⁶ For instance, when a client complains that an attorney should have sued in tort rather than contract, retained a different expert at trial, or secured a more favorable verdict, the vast majority of jurisdictions hold that it is inappropriate for an expert to render an opinion as to how the conduct of the defendant attorney may have impacted the outcome of the underlying case.⁷ The case-within-a-case procedure is probably seen most frequently as a justification for excluding this type of expert testimony on causation and damages, in favor of allowing the jury to simply re-try the original case as ideally envisioned by the plaintiff.⁸ In this context, events that never occurred become hypotheses to

3. See *infra* *Origin and History of the Case-Within-a-Case*.

4. See *infra* *Re-Litigating the Case That Was Already Tried, Versus Litigating the Case That Was Never Tried*.

5. MALLEN, *supra* note 1, §§ 37:1, 37:86. Courts and commentators may also describe this procedure as a “trial-within-a-trial” or “suit-within-a-suit.”

6. See, e.g., *Viner v. Sweet*, 117 Cal. Rptr. 3d 533, 560 (Cal. Ct. App. 2004) (Johnson, J., dissenting); see also George L. Blum, Annotation, *Assignability of Claim for Legal Malpractice*, 64 A.L.R.6th 473 *2 (2016).

7. See W. E. Shipley, *Proximate Cause in Malpractice Cases*, 13 A.L.R.2d 11 *2 (2014) (“Although expert testimony is ordinarily required to support a finding of causation in malpractice, it has frequently been recognized that it is not proper to allow an expert to substitute himself for the jury and testify positively as to the cause of the injuries, since this is one of the ultimate issues in the case. However, in a number of cases, although generally recognizing the impropriety of a witness’ invasion of the province of the jury, the courts have approved admission of direct expert testimony as to cause.”).

8. See, e.g., *Chocktoot v. Smith*, 571 P.2d 1255, 1258 (Or. 1977) (“[E]ven when the alleged negligence concerns the conduct of a jury trial, the ‘causation’ issue does not call for reconstructing the probable behavior of the actual jury in that trial. It does not call for bringing the jurors into court and subjecting them to examination and cross-examination to determine what they would have done if the case had been tried differently, nor does it call for expert testimony about the characteristics or the apparent attitudes of those jurors. Although the issue is stated to be the probable outcome of the first case, the second jury is permitted to decide this by substituting its own judgment for that of the factfinder in the earlier case.”); see also *Piscitelli v. Friedenber*, 105 Cal. Rptr. 2d 88, 101-02 (Cal. Ct. App. 2001).

test whether different handling of the underlying action would have positively impacted the plaintiff's case.⁹

Courts often recognize that the case-within-a-case concept is not a perfect solution to resolving the question of causation in a malpractice action; one of the most frequent critiques is directed at the overall efficiency of the procedure.¹⁰ The procedure can be expensive and time intensive, since it not only requires the judge and jury to hear two cases – the malpractice action in the underlying claim. As a result, it also requires the parties to prepare two cases.¹¹ The difficulty associated with fully (or even partially) trying the underlying case can also be compounded in situations where the original record was not sufficiently developed.¹²

Thus, if a former client claims that a settlement should have been more favorable, many states require the client to demonstrate either that their former adversary would have accepted the proposed (more favorable) terms, or that the client would have obtained a more favorable outcome had the case been tried.¹³ However, what if the underlying case involved a matter which was settled before it was technically ready for trial, with little written discovery or depositions on file? The underlying evidence may be incomplete or missing altogether.¹⁴ Witnesses' memories may be particularly hazy where there are no depositions to refresh their collective recollections. Because of these difficulties and limitations, even those jurisdictions which endorse the case-within-a-case procedure recognize various exceptions, and, as discussed below, in many instances the case-within-the-case will not be one hundred percent “new,” but a hybrid of old and new evidence.¹⁵

ORIGIN AND HISTORY OF THE CASE-WITHIN-A-CASE

The origin and history of the case-within-a-case procedure was explored at some length by the California Court of Appeal in *Mattco Forge, Inc. v. Arthur Young & Co.*¹⁶:

9. See *Chocktoot*, 571 P.2d at 1258.

10. See *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 2d 780, 788 (Cal. Ct. App. 1997).

11. See Daniel L. Abrams, *When Case-Within-a-Case Method Helps Plaintiffs Prove Legal Malpractice*, N.Y. LEGAL ETHICS REP. (May 1, 2015), <http://www.newyorklegaethics.com/when-case-within-a-case-method-helps-plaintiffs-prove-legal-malpractice/>.

12. See *id.*

13. See *Air Measurement Tech., Inc., v. Akin Gump Strauss Hauer & Feld, L.L.P.*, 504 F.3d 1262, 1271 (Fed. Cir. 2007); see also Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 SAN DIEGO L. REV. 401, 510 (2000).

14. See Erik M. Jensen, *Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666, 671 (1978).

15. See *infra* *The Underlying Record: Evidence and Issue Preclusion*.

16. 60 Cal. Rptr. 2d at 780.

In 1859, the California Supreme Court was presented with “an action against [a]ttorneys, to recover damage[s] for injuries alleged to have resulted from their negligent and unskillful [defense] of a cause in which they were retained by plaintiff.” In *Hastings*, “[t]he [c]ourt below instructed the jury ‘that plaintiff had not proved any legal damages as resulting from [the attorneys’] neglect.’ . . .” *Hastings* found no error in the instruction. Without use of the phrase trial-within-a-trial, or any comparable language, *Hastings* held “. . . [i]n order to charge the defendants with negligence in failing to set up such defense, he must show by evidence the existence of such facts, and that they were susceptible of proof at the trial by the exercise of proper diligence on the part of his [a]ttorneys.”

Hastings was only the beginning in a long line of cases adopting the trial-within-a-trial method of proof when an attorney is accused of losing a client’s legal claim or defense.

In *Campbell v. Magana* (1960) 184 Cal.App.2d 751, 8 Cal.Rptr. 32, a leading case in the area, the appellant’s counsel argued that “. . . a lawsuit (good or bad) is a chose in action, hence property, and that this one had an actual *value* other than that inhering in an existing right to recover; that it had a settlement or nuisance value which cannot be disregarded.”

In response, *Campbell v. Magana* explained: “This argument cannot prevail for at least two reasons; first, it advances *speculative values as a measure of recovery*; and second, it violates an established rule of this state (and most others) that one who establishes malpractice on the part of his attorney in prosecuting or defending a lawsuit must also prove that careful management of it would have resulted in recovery of a favorable judgment and collection of same . . . ; that there is no damage in the absence of these latter elements, and the burden of proof rests upon the plaintiff to prove recoverability and collectibility [sic] of a plaintiff’s claim”

Campbell v. Magana provides the rationale in support of an admittedly burdensome and complicated approach: it avoids “speculative values as a measure of recovery”

Later cases adopt the descriptive language of a trial-within-a-trial, suit-within-a-suit or case-within-a-case in applying and discussing the plaintiff's burden.¹⁷

This basic rationale has been applied in the vast majority of states, many of which have noted that it is simply inappropriate to allow an expert—generally a lawyer—to advise a jury as to what the likely outcome would have been in the underlying action, had it been handled “properly.”¹⁸

CRITICISM OF CASE-WITHIN-A-CASE METHODOLOGY

The *Mattco Forge* court clearly acknowledged that the procedure has been criticized to the extent that it places a potentially unfair burden on the former client, sometimes in the face of outrageous or even morally reprehensible behavior on the part of the former attorney.¹⁹ The court acknowledged that some of this criticism has been directed at the fact that a plaintiff might face “formidable problems of proof” in having to prove both the malpractice and the viability of the underlying lawsuit.²⁰ The court similarly noted other criticism directed to the fact that the case-within-a-case procedure “almost inevitably results in a confusion of two distinct questions, causation and injury[,]” and fails to recognize the realities of modern litigation.²¹ The court's view shaped the conclusion that since few cases actually go to trial, it might be inappropriate to adjudicate malpractice liability by reconstructing a trial that likely would not have occurred.²²

Relevant to the criticism that the case-within-a-case method may be inappropriate since some matters do not involve an actual “case” and few cases are actually litigated, some courts have observed that the nomenclature should not be taken so literally; instead, the term may be viewed as a shorthand description for the need to demonstrate causation in the context of a legal malpractice action.²³ It can therefore be argued that there is nothing inherently unique about the case-within-a-case analysis relative to the sacrosanct requirement that a plaintiff must prove the defendant's actions or inactions were the factual and legal cause of the

17. *Id.* at 787 (quoting *Hastings v. Halleck*, 13 Cal. 203, 207-09 (1859); *Campbell v. Magana*, 184 Cal. App. 2d 751, 754 (2d Dist. 1960)).

18. *See, e.g., Piscitelli*, 105 Cal. Rptr. 2d at 94; *see also Tarleton v. Arnstein & Lehr*, 719 So. 2d 325, 330 (Fla. Dist. Ct. App. 1998).

19. *Mattco Forge*, 60 Cal. Rptr. 2d at 788.

20. *Id.* (citing John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1128 (1988)).

21. *Id.* at 788 (internal citations omitted).

22. *See id.*

23. *See Watson v. Meltzer*, 270 P.3d 289, 294 (Or. Ct. App. 2011).

damages alleged, as in any other negligence setting.²⁴ In part, for this reason, the *Mattco Forge* court suggested that despite the legitimate criticism, the procedure persists as the “most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation.”²⁵

WHEN IS THE CASE-WITHIN-A-CASE ANALYSIS NOT APPLICABLE?

Even jurisdictions which employ the case-within-a-case framework do not always do so universally.²⁶ One of the most frequent exceptions is seen in cases arising from a transactional lawyer’s alleged malpractice.²⁷ In *Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC*,²⁸ the Colorado Court of Civil Appeals relied on commentary found in treatises such as Mallen & Smith’s *Legal Malpractice*, to emphasize that the manner of proving causation in a legal malpractice action depends largely on the nature of the attorney’s error.²⁹ Thus, where a plaintiff asserts an injury that does not depend on the merits of the underlying matter, the methodology may be wholly inappropriate.³⁰ Numerous other examples include lawsuits in which an attorney was alleged to have breached his or her duty of loyalty,³¹ for instance by misappropriating or misallocating settlement proceeds.³² Since damages in that scenario are not dictated by

24. *See id.* (“It may well be that the shorthand expression of ‘case-within-a-case’ makes sense only in the litigation context, where it may be said that the malpractice occurred in an actual ‘case.’ But the underlying requirement—that a plaintiff demonstrate that, but for the malpractice of the defendant, he or she would have obtained a more favorable result—is not a special rule that applies only in litigation malpractice cases. It is simply the application of the but-for causation requirement that applies in ordinary negligence cases.”).

25. *See Mattco Forge*, 60 Cal. Rptr. 2d at 788.

26. *See* MALLEN, *supra* note 1, § 37:87.

27. *See id.*

28. 2015 Colo. App. 85 (Div. 1 2015).

29. *Id.* ¶ 44 (citing MALLEN, *supra* note 1, § 37:87).

30. *See id.* ¶ 49.

31. *See, e.g., Fiedler v. Adams*, 466 N.W.2d 39, 42 (Minn. Ct. App. 1991) (reversing summary judgment in favor of the defendant attorney and holding that the trial court erred in applying the “case-within-a-case” element of causation where the claim was that the attorney negligently withheld information material to the clients’ decision to pursue or abstain from a given course of action, but did not involve any negligent destruction of the clients’ cause of action); *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 422 So. 2d 1109, 1115 (La. 1982) (Dennis, J., dissenting) (“I would jettison the case within a case requirement. I would require that the party guilty of malpractice repair the wrong he has done to his client by paying him an amount equal to the value of the right destroyed. . . . [Other] jurisdictions . . . have abandoned the case within a case requirement in favor of more modern rules.”); *Fuschetti v. Bierman*, 319 A.2d 781, 785 (N.J. Super. Ct. 1974) (adopting a bifurcated procedure for the resolution of the issue of “cause”). In the *Jenkins* case, Justice Dennis noted that additional proposed approaches include the “lost substantial possibility” test suggested by cases in the medical malpractice arena, or the award of damages based upon “reasonable settlement value.” *Jenkins*, 422 So. 2d at 1115.

32. MALLEN, *supra* note 1, § 37:87.

the viability of a separate action, trying the underlying case will often be unnecessary.³³

In *Lieberman v. Employers Ins. of Wausau*,³⁴ the Supreme Court of New Jersey evaluated whether special factors rendered the case-within-a-case procedure inappropriate for the litigation at issue.³⁵ The court suggested that the trial of the case-within-a-case may be inappropriate for a malpractice action arising from the underlying representation of a defendant, because it requires a “reversal of roles.”³⁶ The court also observed that this may be accompanied by a shift in the burden of proof.³⁷ While both statements are accurate, these difficulties seem to stem less from the case-within-a-case procedure than the basic essence of a legal malpractice case, which will often pit former allies against each other as adversaries, requiring at least one of the parties to take positions which may be completely at odds with positions previously taken when their interests were aligned.³⁸

A classic example involves pleadings or communications advanced on behalf of the defendant in the underlying litigation. Often, the defendant’s attorney will advocate positions which can be proffered in good faith, but which are nevertheless tenuous. If the defense lawyer is later sued by the former client, it may be completely appropriate to disavow positions that were taken in the underlying case, e.g., to demonstrate that the underlying claim was indefensible, and that the lawyers negligence was not the proximate cause of the adverse outcome.

While it may be true that such changes of position could potentially result in situations that are “awkward and impracticable,” the fact remains that it is entirely possible to prosecute or defend such claims so long as both parties—and the court—understand the proverbial rules of engagement.³⁹

33. See *Fiedler*, 466 N.W.2d at 41.

34. 419 A.2d 417 (N.J. 1980).

35. See *id.* at 426 (referring to this approach as a “suit within a suit”).

36. *Id.*

37. *Id.* at 426-27.

38. See *id.* (“In the instant case, however, there is, in effect, a reversal of roles. Lieberman is presently a plaintiff; in the original suit, he was a defendant. A requirement that he proceed in this malpractice action with direct proofs, as though he were the erstwhile claimant, would be awkward and impracticable. More important, such an attempted ‘suit within a suit’ could well skew the proofs so that the present trial would not really mirror the earlier suit and thus a jury in the current case would not obtain an accurate evidential reflection or semblance of the original action, a facsimile which the ‘suit within a suit’ approach is designed to represent.”).

39. See *Lieberman*, 419 A.2d at 427 (“[I]t should be within the discretion of the trial judge as to the manner in which the plaintiff may proceed to prove his claim for damages and that the appropriate procedure should, if not otherwise agreed upon between the parties, be settled through pretrial proceedings.”); see also Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81, 91 (2003) (describing the adjudication of the “case within a case” as creating “difficult-but-not-impossible demands”).

Simply put, there must be adequate consideration of the extent to which evidence, pleadings, agreements, communications, or rulings from the original action are admissible in the malpractice claim.⁴⁰

RE-LITIGATING THE CASE THAT WAS ALREADY TRIED, VERSUS
LITIGATING THE CASE THAT WAS NEVER TRIED

There may be substantive differences in trying a case-within-a-case where the underlying matter has already been tried to a verdict, when compared with situations where the underlying case was never tried or litigated.⁴¹ Aside from litigation matters that did not reach trial, the latter scenario is frequently seen in transactional malpractice actions, where the plaintiff claims his or her former counsel should have negotiated a more favorable agreement.⁴² In such instances, the attorney may certainly argue that no better bargain could have been negotiated or achieved through litigation.⁴³

One area where the trial-within-a-trial method has been regarded as being particularly appropriate is where the lawyer negligently fails to bring an action within the applicable statute of limitations.⁴⁴ The Supreme Court of New Hampshire confronted that precise situation in *Yager v. Clauson*,⁴⁵ wherein it noted one commentator's observation that "[t]he justification for applying the [trial-within-a-trial] method' when a lawyer misses the statute

40. See Kessler, *supra* note 13, at 494 ("The proof that should have been presented in the original case is available; in theory it can be presented to the malpractice jury. The client lives, the witnesses are available, and a jury can be found to decide the merits of the underlying case. It thus appears that the case can be tried, or retried as it should have been originally.").

41. See *id.* at 410 ("[T]he relationship between an attorney who represents a client in litigation is completely different than that between an attorney and a client in a transactional setting. Litigation attorneys control discovery, motion practice, and strategic decision-making. As a result, they have far greater control over access to information, and thus the resulting effects, than their colleagues in other segments of the profession.").

42. See George S. Mahaffey, Jr., *Cause-In-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 397-98 (2004) ("Essentially, the plaintiff has to demonstrate: (1) that the defendant-attorney was the but-for-cause of the purported injury; and (2) that the plaintiff would have received a better deal in the underlying transaction or business deal but for the aforementioned negligence of the defendant-attorney.").

43. David P. Parker et al., *Expert Grilling*, 24 L.A. LAW. 41, 42 (2001) ("[L]iability hinges on proof that the attorney's conduct was the 'cause in fact' of the injury. That proof typically rests in retrying the underlying litigation matter or reconstructing the underlying transaction to determine whether a particular result would have occurred or been avoided but for the conduct of the lawyer.").

Thus, if a lawyer can prove that no better deal was possible, the plaintiff would not succeed in demonstrating the element of causation. See *id.*

44. See Alvin O. Boucher, *North Dakota Legal Malpractice: A Summary of the Law*, 70 N.D. L. REV. 615, 627 (1994) ("In the traditional 'case-within-a-case' approach in negligent litigation cases, the client must essentially put on a trial within a trial. A good example of this is an attorney's failure to sue an automobile accident case within the statute of limitations.").

45. 139 A.3d 1127 (N.H. 2016).

of limitations ‘is readily apparent’: ‘To ask plaintiffs to try their claims only once before receiving compensation is no burden and requires no special justification.’⁴⁶ The *Yager* court accordingly held that this method was an acceptable means of proving proximate cause—i.e. “‘what result should have occurred’”—in the client’s legal malpractice claim.⁴⁷

While the “fresh” trial-within-a-trial of matters that have never been tried before are likely relatively “clean,” since the parties simply try the case from scratch,⁴⁸ cases that come with a record are subject to different considerations, several of which will be explored below.⁴⁹ There is considerable debate as to how much of the original trial is admissible or binding.⁵⁰

The authors of the treatise *Legal Malpractice* suggest in Section 37:89 that most of the underlying record need not be repeated in the later malpractice action:

If the underlying action was fully tried, then it may not be necessary to retry the entire case. If the alleged error presents only a narrow issue, then the “different result” should be determined similarly and with the identical evidence as was admitted in the underlying action. The issues in the “retrial” of a case should be limited to those errors that were the alleged consequence of the attorney’s negligence. The objective is not to retry the underlying case but to decide whether the attorney’s error prevented the proper result. Thus, the judge’s instructions should bind the jury to the prior result unless, assuming the attorney’s error was eliminated, there should have been a better result. Under this limitation, the only evidence

46. *Id.* at 1132 (quoting Clark Crapster, *The Common Sense of Re-creation: Why Texas Should Close the Door to Expert Testimony on But-for Causation in Litigation Malpractice*, 40 TEX. TECH. L. REV. 151, 165 (2007)).

47. *Id.* at 1131 (quoting *Carbone v. Tierney*, 864 A.2d 308 (N.H. 2004)).

48. “Trying” the case from scratch, as opposed to working it up from scratch, which as mentioned above, is rare if not completely unheard of. See Polly A. Lord, *Loss of Chance in Legal Malpractice*, 61 WASH L. REV. 1479, 1481 (1986).

49. See *id.* (“Evidence in the malpractice trial is restricted to that which would have been admitted in the underlying proceeding. Where the trial has not been entirely foreclosed, a full-scale replication might be unnecessary. Instead, courts will merely relitigate the parts of the trial affected by the alleged error, using the prior pleadings, transcripts, and existing records to supply the remaining evidence.”).

50. See *id.* at 1482-83 (“The reality of the trial-within-a-trial method clearly does not meet the promise of a full, theoretically complete reconstruction of the original lawsuit. Dissatisfied courts have struggled with the method, partly because of the impossibility of accurate reconstruction, and partly because of the client’s difficult burden of proof. Commentators assert that the trial-within-a-trial method actually insulates attorneys from liability and is inaccurate because ‘parties face academic claims of liability and use evidence which is not quite what it seems.’ The evidence is restricted to what would have been admitted had the underlying action taken place, despite the fact that the passing of time is bound to impact the quality of the evidence.”).

that should be added to or deleted from the original trial is that which should be attributed to the attorney's negligence.⁵¹

Yet contrary arguments may be advanced in similar circumstances, particularly where the new evidence—or the evidence which should never have been considered—implicates additional evidence, new legal arguments, or even jury instructions, which may be rendered unnecessary by the changing proof.⁵² It is therefore important for litigators to understand how their own theory of prosecution or defense may change depending upon the claim. In other words, plaintiff's counsel in the malpractice action must determine how the case *should* have proceeded, as opposed to how it *actually* proceeded at trial; conversely, the defense attorney will focus upon how the underlying action would have proceeded given additional evidence or new theories of liability, and whether or not these new “wrinkles” would have influenced the ultimate outcome.⁵³

Given the manner in which even a single critical item of proof may dramatically alter how the trier of fact views a particular claim, it may in fact be necessary to fully retry the underlying action, so that the jury is given the opportunity to consider any new evidence in context.⁵⁴ Conversely, where there is an issue as to whether or not particular items of evidence should have been admitted at all, one or both parties may still feel the need to present the entire underlying case, so that full consideration may be given to the impact upon the ultimate outcome that may be occasioned by the introduction or absence of certain items of evidence.⁵⁵

ESTABLISHING CAUSATION WITH EXPERT TESTIMONY

As alluded to in the introduction, the case-within-a-case procedure is often contrasted with the proverbial “battle of the experts,” in which expert witnesses offer conflicting opinions as to what would have happened under

51. MALLEN, *supra* note 1, § 37:89.

52. *See, e.g., Lieberman*, 419 A.2d at 426-27 (acknowledging that evidence from the underlying action may be admissible, but may be rendered impractical due to the passage of time and loss of such evidence). Proofs could be skewed from the previous trial to the new trial such that it would “not really mirror the earlier suit.” *See id.* It is, therefore, within the court's discretion, as well as the parties', to determine which evidence should be allowed or disallowed. *See id.*

53. *See id.* (discussing how the change in proof could skew the jury and create an awkward, impracticable situation for the attorneys and the parties).

54. *See* MALLEN, *supra* note 1, § 37:89 (observing that full re-litigation may not be necessary, but that the judge's instructions should bind the jury based on the narrow issue of proving the underlying claim).

55. *See Lieberman*, 419 A.2d at 427 (discussing how it should be left to the judge or to the parties' agreement on how best to proceed with evidence or any expert testimony regarding the underlying action, and as is typical, settled in pretrial proceedings).

different circumstances.⁵⁶ While many states require legal malpractice cases to be supported by expert testimony regarding the relevant *standard of care*, and most jurisdictions allow expert testimony regarding breaches of that standard of care and certain elements of causation, the use of experts to testify regarding what *would have happened* under different circumstances is generally limited.⁵⁷

For instance, in *Lieberman*, the Supreme Court of New Jersey discussed the prospect of simply substituting expert opinion for a complete retrial on the merits, while ultimately declining to pick a “best option.”⁵⁸ Instead, the court determined that the trial court should exercise its discretion to determine the appropriate procedure; the court did not rule out the prospect of using expert testimony to establish within a “reasonable probability” what would have transpired at the original trial in light of the expert’s experience.⁵⁹

The problem with this approach is relatively clear. If the lawyer expert could not have testified in the underlying action with respect to matters of causation, how does that same expert somehow become competent to testify in the later malpractice suit? For example, since a lawyer could not possibly testify that a neurosurgeon violated the prevailing standard of care in a medical malpractice case, causing injury to a patient, how could that same lawyer testify competently in a later legal malpractice action that the defendant in the underlying medical malpractice case would have prevailed had the case been defended “properly?”⁶⁰

56. See David A. Barry & William L. Boesch, *Massachusetts Legal Malpractice Cases 2000-2009*, 93 MASS. L. REV. 321, 328 (2011) (“To prove that a lawyer’s negligence caused him to lose a chance for the favorable settlement, the client must show that the value of the case was, in an objective sense, different from the result obtained by the client. Clients may seek to make this showing by presenting expert testimony as to the reasonable settlement value of the claims without the defendant lawyer’s negligence.”).

57. See Boucher, *supra* note 44, at 621 (“Generally, the client must submit the opinion of an expert to establish the standard of care of the attorney being sued for malpractice.”).

58. *Lieberman*, 419 A.2d at 427.

59. *Id.*

60. See, e.g., *Kelley & Witherspoon, L.L.P. v. Hooper*, 401 S.W.3d 841, 848-49 (Tex. Ct. App. 2013). In *Kelley & Witherspoon*, a Texas appellate court recognized the distinction between the “underlying” causation a plaintiff would have had to prove in the underlying case, and “malpractice” causation addressing whether the attorney’s alleged mistake made a difference:

In summary, a legal-malpractice plaintiff who contends that his attorney’s negligence caused him to lose a claim he otherwise would have won and collected on must adduce expert testimony to prove the case-within-a-case aspect of causation if that causal connection is beyond a lay juror’s common understanding. If the plaintiff would have needed medical-expert testimony to prevail in the underlying suit, then the same kind of testimony is required to prove the case-within-a-case in the legal-malpractice suit.

Whether expert testimony is required to prove proximate cause in a legal malpractice case frequently depends not only upon the jurisdiction, but also the specific facts of the case.⁶¹ In any event, the necessity for expert testimony does not effectively permit that expert to opine on any matter he or she pleases; to the contrary, as in any other tort suit, neither party should be permitted to call an expert to testify on matters that are outside of their area of expertise.⁶² Nor should an expert be allowed to offer an opinion on an ultimate issue.⁶³

In *SiRF Tech. Inc. v. Orrick Herrington & Sutcliffe LLP*,⁶⁴ a legal malpractice claim arising from the attorney's representation of the plaintiff in a patent dispute before the International Trade Commission, the United States District Court for the Northern District of California held that an expert's opinion was "not just permissible, but likely necessary, to resolve the causation of a legal malpractice suit involving complex issues of patent law."⁶⁵ Thus, in the patent context, proving causation may require the plaintiff to prove that they would have received the patent in question if not for the attorney's negligence in preparing and filing the applications.⁶⁶ This can be contrasted with the holding in *Davis v. Brouse McDowell, L.P.A.*,⁶⁷

Id. Thus, like most states, Texas requires expert testimony where the standard of care involves complex issues, including trial tactics and decisions, or matters of causation which are not within the purview of the average juror. *Id.*

61. *See, e.g., Alexander v. Turtur & Associates, Inc.*, 146 S.W.3d 113, 119-20 (Tex. 2004) ("[T]he wisdom and consequences of . . . tactical choices made during litigation are generally matters beyond the ken of most jurors. And when the causal link is beyond the jury's common understanding, expert testimony is necessary."); *see also Shields v. Campbell*, 559 P.2d 1275, 1280 (Or. 1977) ("Since plaintiff, to prevail in this [malpractice] case, had to convince the trier of fact . . . that the result in the earlier trial would have been favorable to her had [her lawyer] introduced the two documents in question, we know of no other way in which the jury could have been guided in determining the [causation] issue than the presentation of opinion by properly qualified experts.").

62. *See Barry & Boesch, supra* note 56, at 328 ("To the extent that an expert seeks to testify about the factual merits of the underlying matter—that is, about which witnesses were likely to be believed, and which documents were likely to be persuasive to a factfinder—this would not seem to be a proper subject for expert testimony, but rather something for the factfinder in the malpractice suit to determine directly, by hearing the witnesses and considering the documents. Nor should an expert be permitted to comment upon the proper resolution of legal issues at stake in the underlying case—this is the function of the court.").

63. *See, e.g., Piscitelli*, 105 Cal. Rptr. 2d at 101 (omission in original) (quoting *Summers v. A. L. Gilbert Co.*, 82 Cal. Rptr. 2d 162 (Cal. Ct. App. 1999) ("Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided . . . There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision. Although the court here obviously believed expert opinion on the ultimate result of the arbitration would assist the jury in rendering its decision, we conclude its admission in this case was a clear abuse of discretion. In ruling as it did, the court misconceived the jury's function in the legal malpractice case-within-a-case format.").

64. No. C 09-04013 MHP, 2010 WL 2560076 (N.D. Cal. June 22, 2010).

65. *Id.* at *1, *15 n.3.

66. *See, e.g., Davis v. Brouse McDowell, L.P.A.*, 596 F.3d 1355, 1360 (Fed. Cir. 2010).

67. 596 F.3d at 1355.

however, wherein the expert's opinion that the plaintiff "would have been awarded [U.S.] patents on her inventions" was deemed conclusory and did not create a genuine issue of material fact regarding the patentability of the plaintiff's inventions.⁶⁸

THE UNDERLYING RECORD: EVIDENCE AND ISSUE PRECLUSION

The case-within-a-case is rarely, if ever, worked up entirely from scratch. To the contrary, a client suing for legal malpractice based on the alleged mishandling of an underlying medical malpractice case does not typically "replead" the underlying case, or even fully "litigate" it as it would have been litigated if it was truly a free-standing claim.⁶⁹ Even where the case-within-a-case procedure is used, presentation of the underlying case is often a hybrid of old and new evidence; indeed, the malpractice parties may retain new medical malpractice experts to funnel relevant testimony before the legal malpractice jury.⁷⁰ Yet those "new" experts may rely upon "old" evidence if the parties provide their experts with depositions taken in the underlying case, rather than re-deposing every fact witness who testified in the original action.⁷¹

The degree to which a party may wish to re-litigate the underlying case will often depend on how favorable the underlying record is to that party. Plaintiffs will frequently wish to rely on an order or appellate decision commemorating a tactical misstep by the defendant attorney in the underlying action. For example, where the attorney fails to raise a particular error which is then noted by a court of appeal as a basis for the denial of a new trial, the plaintiff's attorney in the later malpractice action will want to introduce that finding into evidence. Conversely, the attorney defendant in a malpractice action may wish to rely on portions of the underlying record which contradict positions their former client has taken in the malpractice action, or which cast that client in a negative light.

68. *Id.* at 1363-64.

69. See MALLEN, *supra* note 1, § 37:89 ("The objective is not to retry the underlying case but to decide whether the attorney's error prevented the proper result.")

70. See F. Parks Brown, *Evidentiary Standards in the Legal Malpractice Trial-Within-a-Trial*, 3 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 320, 324-25 (2013) ("Expert testimony is required to aid the jury's decision in medical malpractice cases and in some complex litigation, so this variety of evidence is generally deemed admissible and is often required to prove causation in a legal malpractice claim relating to those lawsuits.")

71. See Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1127 (1991) ("An expert witness need not have any previous contact with a case. In most cases, any minimally qualified practitioner of the expert discipline at issue is eligible to testify; the expert's entire knowledge of the case may be obtained after she has been enlisted as a witness.") Thus, the "new" expert in the legal malpractice litigation must get evidence from the record, generally coming from the underlying action. *Id.*

The question of whether the underlying record is even admissible has been the subject of considerable debate. Some commentators observe that much of the underlying record in a malpractice case is not considered hearsay in the later action, because the given evidence generally is not used to establish the truth of the matters stated, but is rather intended to document “what evidence was offered and what transpired.”⁷² In some cases – and in some jurisdictions – portions of the record will be admissible, if not the entire record.⁷³ As noted in the introduction, however, these approaches vary both by jurisdiction and by the particular application of the proffered evidence to the specific issue.⁷⁴

In *In re Alan Deatley Litig.*,⁷⁵ the United States District Court for the Eastern District of Washington noted the dearth of authority explaining exactly “how” to try the case-within-a-case, while assessing whether deposition transcripts that had not been used in the underlying case could be used as evidence in the malpractice case.⁷⁶ The court explored whether a case-within-a-case is actually a completely clean slate in which the parties can rely on any evidence that supports their positions, or whether the malpractice evidence should be limited in some way by the boundaries of the underlying proceeding.⁷⁷ The court ultimately noted that the privileged nature of the transcript would have precluded its admission in the underlying case, after clarifying that in many instances the entire record may nevertheless be both relevant and admissible:

The court hearing the malpractice action is not restricted to considering solely the evidence or defenses actually developed in the underlying case. Indeed, the record of the underlying case is relevant to the question before this court only in that it provides evidence of what transpired in the underlying case. This case is not necessarily fixed by what was or what would have been the procedural status of the underlying case because the objective is to determine what should have been the appropriate result, not what in fact would have been the result. However, because the transcript of the dictation more likely than not would have been protected by the attorney-client privilege in the Underlying Litigation, the court

72. MALLEN, *supra* note 1, § 37:147.

73. *Clary v. Lite Machs. Corp.*, 850 N.E.2d 423, 434 (Ind. Ct. App. 2006) (omission in original) (quoting *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 344 (Ind. 1991)) (“[W]here the attorney’s alleged act of malpractice occurred at trial, . . . the entire course of events at the first trial becomes relevant to the malpractice claim.”).

74. *See supra* Introduction to the “Case-Within-a-Case” Procedure.

75. No. CV-06-0278-JLQ, 2008 WL 4153675 (E.D. Wash. Aug. 29, 2008).

76. *Id.* at *10.

77. *Id.*

concludes that ultimately H & K's transcript of Alan's dictation should not and will not be considered herein.⁷⁸

A simple illustration of *why* a full and reasoned analysis of the attorney's actions as the alleged proximate cause of damages must necessarily include "evidence of what transpired" in the underlying case can be found in *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*.⁷⁹ There, the United States Court of Appeals for the Seventh Circuit determined that a district court's refusal to admit the transcript of the underlying trial into evidence justified a retrial on liability.⁸⁰ The attorney defendant had not offered the transcript to prove the veracity of the testimony.⁸¹ Instead, the defendant's attorney had attempted to demonstrate the sheer volume of adverse testimony, in support of his contention that the attorney could not have prevailed on behalf of his client under the best of circumstances.⁸²

Although a transcript from another trial is generally hearsay if offered to prove the truth of testimony presented at the original trial, as was noted above, the *Transcraft* court determined that the transcript had not been offered for that purpose.⁸³ Rather, the transcript was the best possible evidence to demonstrate just how extensive and damaging the testimony had been against the former client in the underlying action.⁸⁴ Given that testimony, defense counsel argued that little could have been done by the allegedly negligent attorney to defeat the adverse judgment, or even to avoid an award of punitive damages.⁸⁵ The court explained:

Such use of the transcript of the underlying trial is not only routine in legal malpractice suits; it is also far superior to having the participants in the trial testify to their recollections; *and its admissibility for this purpose, that is, for establishing the strength (or weakness) of the plaintiff's case, the case he claims the lawyer botched to his detriment, cannot be questioned.*⁸⁶

The court concluded that the error was not harmless; thus, where the question of the defendant attorney's negligence was a close one, a new trial

78. *Id.*

79. 39 F.3d 812, 818 (7th Cir. 1994); *In re Alan Deatley Litig.*, 2008 WL 4153675, at *10.

80. *Transcraft*, 39 F.3d at 818, 821.

81. *Id.* at 818.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Transcraft*, 39 F.3d at 818.

86. *Id.* (emphasis added).

was required in light of the failure to admit the actual transcript of the proceedings in the underlying case.⁸⁷

Because a negligence claim involving prior litigation may present limitless factual variations which may have—or which could have—affected the ultimate outcome in the case, the question of how a party wishes to use actual or potential evidence from the underlying action gives rise to infinite potential applications that are beyond the scope of this article. Testimony or evidence developed in the underlying matter may provide evidence which should be considered by the judge or jury in the later malpractice action.⁸⁸ The court must ultimately determine whether that evidence—including rulings by the judge in the original proceedings—is actually being used to imply that the judge or jury in the later malpractice action are somehow bound by events in the underlying case.⁸⁹ Those issues may arise both with regard to actual evidence which was utilized (or which should have been utilized) in the underlying case, as well as the record of the proceedings themselves, including communications, pleadings, discovery, transcripts, and rulings.⁹⁰

COLLATERAL ESTOPPEL: OFFENSE VERSUS DEFENSE

A logical offshoot of the foregoing discussion is the question of what role evidence from the underlying case may play in the later malpractice action. While anecdotal experience suggests that many malpractice attorneys simply assume the defendant attorney is “bound” by any and all adverse rulings which may have given rise to a negative result in the underlying proceedings, in fact, that is rarely the case. Generally, collateral estoppel may not be used to bind a malpractice defendant to the results in the underlying case, because the attorney was not an actual party to the first suit.⁹¹ This is typically required to justify application of collateral estoppel, since collateral estoppel generally requires an “identify of parties.”⁹² Thus, the attorney defendant in the later malpractice action is generally free to

87. *Id.*; see *Walker v. Bangs*, 601 P.2d 1279, 1284 (Wash. 1979) (internal citations omitted) (holding that “[i]n a legal malpractice action alleging negligence in the conduct of litigation, the record of proceedings from that underlying trial may be the best evidence of the events that transpired. Defendants objected in this case that the report of proceedings was properly excludable as hearsay. We are satisfied that the proffered transcript of proceedings of the federal trial is not excludable as hearsay because it was not offered to establish the truth of the matter contained in the record, but rather to establish what evidence was produced in court. In any event, the transcript of proceedings would be admissible as an exception to the exclusionary rule because of its high degree of trustworthiness which follows from its manner of production.”).

88. See *Transcraft*, 39 F.3d at 817-18.

89. See *id.*

90. See MALLEN, *supra* note 1, § 37:147.

91. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 332-33 (1979).

92. See *id.* at 329-30.

litigate most—if not all—of the elements of the underlying action, since it is rare for courts to permit collateral estoppel to be utilized *offensively*.⁹³

While the former client generally cannot rely upon collateral estoppel to prevent his or her former counsel from re-litigating matters that may have been addressed in the earlier proceedings, collateral estoppel is commonly utilized *defensively* as a bar to the re-litigation of issues that were addressed in the underlying proceedings.⁹⁴ The defensive use of collateral estoppel may typically be invoked by a defendant who wishes to rely on a matter that was fully adjudicated in the underlying proceeding.⁹⁵ In those instances, since the former client was a party to the proceedings, collateral estoppel may well be applied defensively, so long as the former client had a full opportunity to litigate a particular issue in the underlying action.⁹⁶ Thus, a defendant may legitimately argue that the court should bind the plaintiff to an earlier ruling or outcome,⁹⁷ even though the defendant's former client may be wholly unable to take advantage of rulings which reflect unfavorably upon the attorney defendant in the underlying action.⁹⁸ Understanding the strengths and weaknesses of each approach, and how they may affect one another is important when evaluating any legal malpractice case.⁹⁹

One noteworthy example of collateral estoppel being applied defensively to bar a plaintiff from re-litigating an issue can be found in *Frank v. Folmer*.¹⁰⁰ There, former clients sued their attorney, alleging they would have prevailed but for the attorney's suggestion that they settle a claim which arose from the clients' purchase of property.¹⁰¹ The clients

93. *Fin. Freedom Senior Funding Corp. v. Bellettieri*, 852 F. Supp. 2d 430, 435 (S.D.N.Y. 2012); *Preferred Pers. Servs., Inc. v. Meltzer, Purtill & Stelle, L.L.C.*, 902 N.E.2d 146, 157 (Ill. App. Ct. 2009); *Rosenberg v. Shostak*, 405 S.W.3d 8, 13 (Mo. Ct. App. 2013) (explaining that courts generally favor defensive collateral estoppel more than offensive collateral estoppel).

94. *Parklane*, 439 U.S. at 329-30.

95. *Rosenberg*, 405 S.W.3d at 13.

96. *Id.*

97. *See id.* at 14.

98. *See id.* The related doctrine of judicial estoppel is also available in many jurisdictions, and it may prevent a former client from advancing arguments in the malpractice case which are entirely at odds with positions taken in the original trial court proceedings. *See Gottfried v. Kutner*, No. 08-65074 CA 31 11-12 (Fla. 11th Jud. Cir. Oct. 20, 2010). In *Gottfried*, a trial court judge dismissed with prejudice a claim against the plaintiff's former divorce attorney, after determining that the plaintiff was asserting positions that were "contrary to positions she had already taken on the record in the divorce court" *Id.* The court cited a decision by the Florida Supreme Court and noted that judicial estoppel is designed to prevent parties from taking inconsistent positions in different lawsuits, thus "making a mockery of justice . . ." *Id.* (quoting *Blumberg v. USAA Casualty Insurance Co.*, 790 So.2d 1061 (Fla. 2001)). A copy of the *Gottfried* decision is available at <http://www.kgplp.com/pdf/gottfried%20v%20kutner%20order%20dismissal%20w%20prejudice.pdf>.

99. *See Rosenberg*, 405 S.W.3d at 13.

100. No. 00-48 (JRT/RLE), 2001 U.S. Dist. LEXIS 19853, at *15 (D. Minn. Nov. 26, 2001).

101. *Id.* at *1.

claimed that they would have been successful had they pursued a claim for misrepresentation.¹⁰²

The defendant attorney emphasized that in order for the clients to prove their malpractice claim, they would necessarily have to prove that they would have prevailed on a specific misrepresentation claim against the sellers in the underlying matter.¹⁰³ However, the clients had already sued the sellers based upon that precise theory in an earlier action. They lost the case.¹⁰⁴ The trial court in the malpractice action determined that the former clients were bound to that judgment.¹⁰⁵ Therefore, based upon principles of collateral estoppel, the federal court judge determined that the clients could not establish an essential element of their claim.¹⁰⁶

In contrast to the holding in *Frank*, other courts have found various reasons why collateral estoppel would not bar a plaintiff from “re-establishing” a fact to support a malpractice claim, even where the underlying court had made an earlier determination of that same fact.¹⁰⁷ For instance, in *Bunday v. Haehnel*,¹⁰⁸ the court held that the doctrine did not apply where the underlying issues—the commingling of funds from the client’s inheritance and a determination of the value of the marital estate—were only components of the parties’ arguments in the underlying divorce action.¹⁰⁹ However, the court found that those issues had not been “fully litigated,” as contemplated by those cases which have applied collateral estoppel to bar a later inconsistent finding.¹¹⁰ The court also drew a distinction between the actual result, and the *reasoning behind the result*.¹¹¹ While collateral estoppel binds a party to a specific outcome, the court explained that the parties are not necessarily bound to a particular court’s justification for reaching that outcome in subsequent litigation:

In addition, in ruling on the post-divorce motion, the trial court found an absence of mistake and fraud. . . . Although the court ruled that plaintiff failed to demonstrate that the judgment of divorce was unfair or that the inheritance had been commingled, this was considered by the court to be a “fact” involved as part of its “other considerations” and not an actual legal ruling. “In issue preclusion,

102. *Id.* at **7-8.

103. *Id.* at **10-11.

104. *Id.*

105. *Frank*, 2001 U.S. Dist. LEXIS 19853, at *12.

106. *Id.*

107. *Bunday v. Freeman Haehnel & Haehnel & Phelan*, No. 288994, 2010 WL 446099, at *12 (Mich. Ct. App. 2010).

108. No. 288994, 2010 WL 446099 (Mich. Ct. App. 2010).

109. *Id.* at *12.

110. *Id.* at *12, *14.

111. *See id.* at *15.

it is the prior judgment that matters, not the court's opinion explicating the judgment."¹¹²

Other courts have declined to apply collateral estoppel based on a narrow construction of the "identity of issues" consideration.¹¹³ Since the narrower doctrine of collateral estoppel simply precludes re-litigation of *issues*—as opposed to the broader preclusion of entire *claims*, the hallmark of *res judicata*—"identity of issues" should theoretically apply to most determinations other than the actual outcome of the case.¹¹⁴ In *Dawson v. Toledano*,¹¹⁵ the claimant filed a malpractice case in light of an attorney's advice to pursue an appeal that was ultimately deemed frivolous by the appellate court, which also awarded fees.¹¹⁶ The plaintiff, Dawson, sought to rely on that appellate ruling, arguing in turn that the pursuit of a frivolous appeal constituted malpractice "per se."¹¹⁷ While the court's analysis seemed to turn largely on the identity of issues prong of collateral estoppel,

112. *Bunday*, 2010 WL 446099, at **14-15 (quoting *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)). *But see Preferred Pers. Servs.*, 902 N.E.2d at 157 (citations omitted) ("Illinois courts have cautioned against offensive use of collateral estoppel because, as noted by our supreme court, it does not always foster judicial economy and fairness in the way that defensive use of collateral estoppel typically does, instead perhaps providing an incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. This caution is especially well-founded in the case at bar, where the malpractice claims were brought prematurely against Meltzer and Palmer by improper joinder to maintain a provisional malpractice suit prior to adjudication of the underlying claims. As noted, Preferred openly stated, on prior appeal of the Gallagher claims, that its purpose in litigating the claims against Gallagher to finality on appeal was 'to foreclose Meltzer-Palmer from arguing that Preferred prematurely abandoned a viable claim against Gallagher.'").

113. *See Dawson v. Toledano*, 134 Cal. Rptr. 2d 689, 695 (Cal. Ct. App. 2003).

114. However, more than one court has held that "issue preclusion" was inappropriate in malpractice cases because the underlying matter did not necessarily consider whether the attorney mishandled aspects of the case. *See, e.g., Gray v. A.C. Strip*, No. C2-99-62, 2002 WL 193696, at *5 (S.D. Ohio 2002). The court stated,

Plaintiff argues that collateral estoppel does not apply in this case because the "identical issue" requirement has not been met. Defendants argue that the issue of whether just cause existed to terminate Plaintiff's employment should be afforded preclusive effect. Defendants further argue that the issue of Plaintiff's wrongful termination is the core of the present dispute. The Court disagrees. The issues in this case involve whether Defendants committed legal malpractice in their earlier representation of Plaintiff in the EMS lawsuit by breaching a duty they owed to Plaintiff. The issue of Defendants alleged malpractice in their representation of Plaintiff was not litigated in the earlier action. Clearly, the 'identical issue' requirement for issue preclusion has not been met. Defendants have therefore failed to establish that the prior judgment should be given preclusive effect.

Id.; *see Petter Inv. Co. v. Price Heneveld Cooper DeWitt & Litton, L.L.P.*, No. 309762, 2013 WL 1442200, at *4 (Mich. Ct. App. 2013) ("The federal court's inquiry in the underlying case (whether plaintiffs infringed on Hydro's patents) is different from the state trial court's inquiry (whether defendants were negligent in representing plaintiffs).").

115. 134 Cal. Rptr. 2d at 689.

116. *Id.* at 691.

117. *Id.* at 695.

the court's reasoning provides a workable template for any defendant seeking to defend against an attempt to offensively apply a court ruling from the underlying claim in a later malpractice action:

In a case such as this, we start with the fact that a court in another proceeding has adjudicated an appeal to be frivolous, that being a question of law. Whether the appellate practitioner who handled that appeal has breached a duty and whether any breach proximately caused harm are ordinarily questions of fact for the jury. Thus, at the outset, we observe that were we to accept the notion that once an appeal has been adjudged frivolous by a court, the attorney is deemed to have committed malpractice, we would be usurping the province of the jury to decide whether, as a factual matter, a breach has occurred and the breach has proximately caused harm to the client. Of course, breach of duty and proximate cause may on occasion be resolved as matters of law, if there can be no reasonable doubt as to whether the attorney's conduct fell below the standard of care or if reasonable minds could not differ as to whether there was causation. Yet those instances are very rare and this is not one of those instances.

In addressing breach of duty, "the crucial inquiry is whether [the attorney's] advice was so legally deficient when it was given that he [or she] may be found to have failed to use 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.'" It is unclear on the record before us whether Toledano's advice was indeed that deficient. He claims to have asserted that Dawson had a viable appeal under the principles established in *Knight v. Jewett, supra*, 3 Cal.4th 296, 11 Cal.Rptr.2d 2, 834 P.2d 696, arguing that Snow Summit, Inc. had a duty not to increase the inherent risks of skiing by putting up a hard wooden fence as a barrier where any skier who fell could hit it. We cannot say in the abstract that such an argument is inherently unmeritorious. At the same time, we do not know whether it was properly preserved for appeal. Moreover, expert testimony may be required, as is frequently the case, in order to resolve the factual issue of whether the attorney adhered to the standard of care.

Even were we inclined to skip this step in the analysis and state that once a court has held an appeal to be frivolous the attorney handling the appeal must necessarily have breached the duty of care, this

would not mean that the attorney would be liable ipso jure in a malpractice action. The final step in the analysis would still need to be addressed, because the mere breach of the standard of care does not give rise to a cause of action for malpractice. “[U]ntil the client suffers appreciable harm as a consequence of his [or her] attorney’s negligence, the client cannot establish a cause of action for malpractice.”¹¹⁸

In contrast, the case of *Burton v. Kaplan*¹¹⁹ involved somewhat unique circumstances. There, in a subsequent malpractice and conversion claim, the plaintiff was permitted to rely upon the fact that the defendant attorney had been disbarred for misappropriating the client’s money.¹²⁰ Although bar proceedings are generally inappropriate for application in a later civil action,¹²¹ the *Burton* court alluded to the fact that the defendant attorney made no effort to demonstrate that he had not been afforded a full and fair opportunity to defend himself in the prior disbarment proceedings, or to litigate whether he had failed to properly segregate client funds and later misappropriated those funds for his personal use.¹²² Under the circumstances, the appellate court held that the attorney could be prevented from re-litigating those issues.¹²³

While there are countless examples of how collateral estoppel has applied to bar a client or their former attorney from litigating issues that were decided in an earlier proceeding, practitioners should be aware that application of the doctrine should be “narrowly tailored to fit the precise facts and issues that were clearly determined in the prior judgment.”¹²⁴ Nevertheless, where it is clear that the same issues have been fully litigated in the underlying action, and that the decision in the underlying action was not somehow prompted by the attorney’s alleged negligence, or where the adverse decision in the underlying case is based solely upon findings of misconduct leveled against the former client, collateral estoppel will

118. *Id.* at 696-97 (citations omitted).

119. 184 A.D.2d 408, 408-09 (N.Y. App. Div. 1992).

120. *Id.*

121. These proceedings are generally deemed inadmissible because of the disparate standards that apply to civil claims, as opposed to administrative proceedings, and the express, intentional separation of civil matters and bar proceeding, as set forth in the ethics rules of most jurisdictions. *See Developments in the Law—Lawyers’ Responsibilities and Lawyers’ Responses*, 107 HARV. L. REV. 1547, 1583 (1994) (“The ABA’s promulgation of multiple normative codes, combined with increased state-court activism has led to tremendous disparity among state ethics rules. Although most states adhere generally to one of the ABA’s proposed systems, many have implemented individualized variations. Compounded by the increase in the multistate practice of law, differences in state ethics rules have led to many complicated scenarios.”).

122. *Burton*, 184 A.D.2d at 408-09.

123. *Id.* at 409.

124. *See Preferred Pers. Servs.*, 902 N.E.2d at 157.

generally be held to apply to prevent the client from re-litigating issues that were fully resolved in the underlying action.¹²⁵

THE ROLE OF JUDICIAL ERROR

Judicial error arguments pose a distinct problem for the legal malpractice defendant.¹²⁶ The reasons are obvious—juries or the trial court judge in the malpractice action often struggle with the notion that the judge in the original proceeding somehow “got it wrong.”¹²⁷ Those concerns become particularly problematic where the judge in the malpractice case is asked to revisit a decision of an appellate court panel, or to reconsider legal rulings that may become evidence in the malpractice action.¹²⁸ In most instances, however, an appellate reversal of a trial ruling often renders the trial court ruling presumptively invalid with little need for argument.¹²⁹ Similarly, an erroneous ruling that was never appealed can be challenged with the same legal arguments that could have been advanced to overcome that ruling had an appeal been pursued.¹³⁰

The most difficult cases to consider in this context are those in which a ruling that addresses numerous issues is affirmed on appeal with little or no commentary, or where the entire discussion of the opinion is directed to an issue which differs from the one a defendant seeks to challenge.¹³¹ This type of “silent” affirmation may not in fact constitute an endorsement of specific portions of the trial court ruling; nevertheless, convincing a judge in the malpractice case to effectively reverse even a small component of an order that was affirmed by an appellate court will usually prove rather daunting.¹³²

In *Alderson v. Bergdahl*,¹³³ the Washington Supreme Court allowed a judicial error defense despite the arguable existence of attorney negligence.¹³⁴ The *Alderson* case involved a dispute between partners who owned and controlled a family farm, Triple A Farms.¹³⁵ The dispute arose

125. *See id.*

126. *See Alderson v. Bergdahl*, No. 28790-4-III, 2011 WL 3503209, at *4 (Wash. Ct. App. 2011).

127. *See, e.g., Stanfield v. Neubaum*, 494 S.W.3d 90, 96 (Tex. 2016).

128. *See generally id.*

129. *See, e.g., id.* at 104.

130. *See id.* at 96.

131. *See, e.g., Alderson*, 2011 WL 3503209, at *3 (noting that a summary judgment motion will be reviewed *de novo*; however, the appellate court will decide which issues will be addressed in greater detail).

132. *See, e.g., Crestwood Cove Apts. Bus. Trust v. Turner*, 164 P.3d 1247, 1252 (Utah 2007) (citing Pa. Ins. Guar. Ass'n v. Sikes, 590 So. 2d 1051, 1052 (Fla. Dist. Ct. App. 1991)) (discussing a decision that was affirmed on other grounds, but the underlying issue was judicial error).

133. 2011 WL 3503209, at *4.

134. *Id.*

135. *Id.* at *1.

over the ownership of a particular segment of the farm known as the “Grandma Jessie Property.”¹³⁶ The trial court judge, Judge VanderSchoor, ultimately rendered an order which erroneously included the disputed tract in a judicial sale; Judge VanderSchoor ruled that the sale would go forward in accordance with the inaccurate sale documents.¹³⁷

The adversely affected parties did not appeal the ruling.¹³⁸ Rather, they sued the attorney involved in the sale for malpractice, claiming they did not appeal because the attorney advised them that they would not have won.¹³⁹ In the malpractice suit, the defendant attorney argued that no appeal was pursued because the clients needed the money and did not want to jeopardize the sale.¹⁴⁰ The trial judge granted summary judgment for the attorney in the malpractice case, and the appellate court affirmed, in part because the trial court’s ruling broke the causal chain between the attorney’s error and the client’s loss.¹⁴¹ The court explained:

The [causation] element requires that there be a proximate link between the attorney’s error and the client’s injury. That link does not exist here because of Judge VanderSchoor’s ruling on Peterson’s motion to include the Grandma Jessie Property in the sale of the Triple A Farms. Judge VanderSchoor was reminded of his previous ruling giving that property to Robert Alderson, but nonetheless chose to include that land along with the Triple A Farms sale. Assuming, as we must for purposes of a summary judgment proceeding, that the attorney’s error led to this issue arising, it was still the judge’s ultimate ruling to reverse his previous position and include the Grandma Jessie Property in the sale that led to the Aldersons losing that property. The judge’s ruling was the proximate cause of their loss. That ruling broke the causal link between the attorney’s error and the client’s loss.

This court reached a similar result in *Paradise Orchards General Partnership v. Fearing*, 122 Wn.App. 507, 94 P.3d 372 (2004), *review denied*, 153 Wn.2d 1027 (2005). There the attorney representing a seller had drafted the sales agreement, including a remedies clause. When the sale fell through, litigation resulted and the trial judge interpreted the clause as limiting the remedies available to the seller. The seller then settled with the buyer on less

136. *Id.*

137. *Id.* at **1-3.

138. *Alderson*, 2011 WL 3503209, at *2.

139. *Id.*

140. *Id.*

141. *Id.* at *3, *6.

favorable terms than desired and sued its attorney for malpractice. The trial court ruled that the first judge had erred in the interpretation of the remedies clause and found no legal malpractice. This court agreed that the client's remedy was to challenge the judge's ruling rather than sue the attorney. The judgment in favor of the attorney was affirmed.

As in *Fearing*, the remedy for the erroneous inclusion of the Grandma Jessie Property in the sale was to appeal the ruling. The Aldersons did not do so. *An attorney malpractice action is not an insurance policy against judicial error. An aggrieved party must challenge an erroneous ruling by appeal rather than sue counsel for the judge's error.*¹⁴²

Occasionally, a judicial error analysis will be coupled with the related concept of "abandonment."¹⁴³ This acts as an independent defense to a claim for malpractice where the client effectively abandons the lawsuit without taking advantage of an opportunity to cure the harm occasioned by the attorney's alleged negligence.¹⁴⁴ For instance, in *Pennsylvania Ins. Guar. Ass'n v. Sikes*,¹⁴⁵ a Florida appellate court held that the plaintiff's failure to pursue an appeal in the face of clear judicial error constituted abandonment,¹⁴⁶ which barred the former client from pursuing the malpractice claim.¹⁴⁷ The court explained that a reversal of the adverse judgment would have been likely if in appeal from the judgment in the personal injury action had run its appellate course, thus obviating the temporary effects of the attorney's malpractice.¹⁴⁸ Consequently, the court held that the settlement of the underlying case while the appeal was pending

142. *Id.* at **3-4 (emphasis added) (citations omitted).

143. *See, e.g.*, *Eastman v. Flor-Ohio, Ltd.*, 744 So. 2d 499, 502 (Fla. Dist. Ct. App. 1999).

144. *See, e.g., id.*

145. 590 So. 2d at 1051, 1052-53.

146. Other state appellate courts have also adopted the abandonment doctrine in some form. For example, in the Ohio case of *E.B.P., Inc. v. Cozza & Steuer*, 694 N.E.2d 1376, 1377 (Ohio Ct. App. 1997), a client decided to settle a case in lieu of pursuing an appeal and then sued its law firm for malpractice. The court ruled that the client abandoned his claim, noting that "[a] settlement entered into as a result of an attorney's exercise of reasonable judgment in handling a case bars [sic] malpractice claim against the attorney." *Id.* at 1379. Similarly, a New York Supreme Court case indicated:

[P]laintiffs, by their own conduct in voluntarily settling prior to the appeal, precluded defendant from pursuing the very means by which he could have vindicated his representation. They should not . . . be permitted to seek damages from counsel in order to recoup a portion of the settlement.

See Rodriguez v. Fredericks, 623 N.Y.S.2d 241, 242 (N.Y. App. Div. 1995).

147. *Pa. Ins. Guar. Ass'n*, 590 So. 2d at 1052-53.

148. *Id.*

effectively constituted an abandonment of any claim that the client's loss resulted from legal malpractice rather than judicial error.¹⁴⁹

In other settings, the court may find that an attorney's error actually compounded an error by the court in the form of a defective default judgment.¹⁵⁰ That issue was addressed by the United States Court of Appeals for the Second Circuit when it reversed a summary judgment for an attorney in *Skinner v. Stone, Raskin & Israel*,¹⁵¹ finding it "most unlikely that the default judgment was entered through the *sole* negligence of the State trial judge."¹⁵² The court concluded that:

a jury, with all the facts before it, also might find that appellees contributed to the fiasco by failing to take steps to head off the entry of judgment, which they were informed was about to take place, a copy of the proposed judgment having been delivered a month prior to its entry.¹⁵³

Accordingly, the Court of Appeal remanded the case for trial, after refusing to determine that the trial court's erroneous ruling amounted to a superseding cause—rather than a contributing cause—of the defective default judgment.¹⁵⁴ The court ruled that the attorneys could ultimately be held liable if their negligence was found to be a proximate *contributing* cause of the client's loss.¹⁵⁵

In addressing the question of when judicial error constitutes a superseding or new and independent cause of loss, the Texas Supreme Court in *Stanfield v. Neubaum*¹⁵⁶ attempted to clarify the boundary between mixed attorney/judicial error that does not constitute a viable bar to the action, and those "pure" judicial errors that do.¹⁵⁷ This is not always an easy distinction to make:

149. *Id.* at 1053.

150. *Skinner v. Stone, Raskin & Israel*, 724 F.2d 264, 265-66 (2d Cir. 1983).

151. 724 F.2d at 264.

152. *Id.* (emphasis added).

153. *Id.* at 266.

154. *Id.*

155. *Id.* at 665-66 (emphasis added); see *Stanfield*, 494 S.W.3d at 93 ("Although we do not hold judicial error is always a superseding cause that would preclude a subsequent malpractice action, proximate-cause principles support our conclusion that judicial error can constitute a new and independent cause depending on the circumstances. Here, the trial court's adverse judgment was reversed on the basis of a judicial error that the trial attorneys did not cause and which could not reasonably be anticipated at the time. We therefore hold that, as a matter of law, any unrelated negligence by the trial attorneys was too attenuated from the remedial appellate attorney fees to be a proximate cause of those expenses.")

156. 494 S.W.3d at 90.

157. *Id.* at 93.

To break the causal connection between an attorney's negligence and the plaintiff's harm, the judicial error must not be reasonably foreseeable. Theoretically, it is always foreseeable that a judge might err in some manner; however, it is not typically foreseeable on what issues a judge will err and on what issues a judge will rule correctly But if the judicial error alleged to have been a new and independent cause is reasonably foreseeable at the time of the defendant's alleged negligence, the error is a concurring cause as opposed to a new and independent, or superseding, cause.

The question then is not whether judicial error is generally foreseeable, but whether the trial court's error is a reasonably foreseeable *result* of the attorney's negligence in light of *all existing circumstances*. A judicial error is a reasonably foreseeable result of an attorney's negligence if "an unbroken connection" exists between the attorney's negligence and the judicial error, such as when the attorney's negligence directly contributed to and cooperated with the judicial error, rendering the error part of "a continuous succession of events" that foreseeably resulted in the harm.

However, merely furnishing a condition that allows judicial error to occur does not establish the ensuing harm was a reasonably foreseeable result of the defendant's negligence If an attorney does not contribute to the judicial error itself and the judicial error is not otherwise reasonably foreseeable in the particular circumstances of the case, the error is a new and independent cause of the plaintiff's injury if it "alters the natural sequence of events" and "produces results that would not otherwise have occurred."¹⁵⁸

COLLECTABILITY OF UNDERLYING JUDGMENT AS COMPONENT OF CAUSATION

Some courts recognize that the requirement of "actual damages" suggests the plaintiff may not recover damages against the attorney if the plaintiff would have been unable to collect on the underlying judgment.¹⁵⁹ The *Berndt* court noted that this view is consistent with the purpose of compensatory damages in general, which are designed to place the plaintiff

158. *Id.* at 99-100 (internal citations omitted).

159. *See, e.g.,* *Berndt v. Levy*, No. 08-1067-WEB, 2010 WL 3913240, at *77 (D. Kan. Sept. 30, 2010).

in a position substantially equivalent to that which he would have occupied had the tort not been committed.¹⁶⁰

CONCLUSION: THE NEED TO UNDERSTAND AND APPRECIATE EVIDENTIARY ISSUES THAT MAY ARISE IN THE CONTEXT OF THE CLASSIC “CASE-WITHIN-A-CASE”

Legal malpractice cases are difficult, even under the best of circumstances.¹⁶¹ They involve complex causation issues and unique evidentiary concerns that are rarely encountered in any other form of tort action.¹⁶² The proverbial “case-within-a-case” adds dramatically to that complexity.¹⁶³ The re-litigation of a matter that has already been tried requires significant assessment concerning the potential admissibility of evidence or rulings from the underlying action.¹⁶⁴ This includes communications between the defendant attorney and the former client, pleadings, or transcripts that are not typically available as evidence in a civil action.¹⁶⁵ The parties must also consider the potential effect of rulings in the underlying action, and more particularly, whether or not those rulings are admissible in the later malpractice action.¹⁶⁶ There are no easy answers, and a body of case law addressing each of these issues has continued to develop as malpractice claims against attorneys have become more common.¹⁶⁷

Practitioners should be content with the understanding that there is likely case law to support virtually any position they might wish to assert with regard to the admissibility—or inadmissibility—of particular items of evidence which were developed in the underlying action, including transcripts of hearings or specific rulings by the original trial court.¹⁶⁸ For every case that has determined that clients should not be allowed to assert positions against their former counsel that are contrary to positions asserted during the underlying action, there are a significant number of cases that

160. *Id.* at *79; *see Kranz v. Tiger*, 914 A.2d 854, 856 (N.J. Super. Ct. App. Div. 2007); *Hecht, Solberg, Robinson, Goldberg & Bagley L.L.P. v. Superior Court*, 40 Cal. Rptr. 3d 446, 453-54 (Cal. Ct. App. 2006).

161. *See Mattco Forge*, 60 Cal. Rptr. 2d at 788.

162. *See id.* at 788-89.

163. *See id.* at 787 (explaining that a case-within-a-case is an “admittedly burdensome and complicated approach . . .”).

164. *See, e.g., Transcraft*, 39 F.3d at 818.

165. *See, e.g., id.*

166. *See id.* (discussing the admissibility of a trial transcript); *see also Stanfield*, 494 S.W.3d at 99 (discussing the potential for error in judicial rulings).

167. *See Stanfield*, 494 S.W.3d at 93; *see also Law Firms See Rise in Malpractice Claim Frequency, Severity*, *INS. J.* (June 27, 2013), <http://www.insurancejournal.com/news/national/2013/06/27/296979.htm>.

168. *See, e.g., Transcraft*, 39 F.3d at 818.

have rejected application of collateral or judicial estoppel in the face of clear negligence by the defendant attorney in the underlying action.¹⁶⁹ In fact, the principal purpose of this article is simply to alert practitioners as to the problems that are inherent in the classic “case-within-a-case,” and to identify issues that might not otherwise be obvious to attorneys who have never prosecuted or defended a legal malpractice claim. Each of the topics covered here would truly merit their own separate article, given the growing body of case law in this evolving field.

Many practitioners who determine to prosecute a legal malpractice claim are emboldened by adverse rulings or negative comments by the trial court judge in the underlying action which suggest malfeasance by the prospective defendant. In many instances, however, the import of the rulings will never be fully explained to the jury, if they are even admitted into evidence. The negative comments are almost never admissible. Under the circumstances, a superficially attractive case may prove to be a procedural nightmare. In other instances, the lawyer defending the allegedly negligent attorney may feel handcuffed by a host of negative rulings which may in fact be admissible, and which may lead to an inference of negligence notwithstanding optimal handling by the original trial lawyer.

The only certainty is that an adverse finding in the underlying action does not necessarily mean that the losing attorney was guilty of malpractice.¹⁷⁰ Beyond that, the proof is subject to an endless variety of extraordinary issues which are certain to confound both counsel and the court.¹⁷¹ Often, the key to the successful pursuit or defense of a legal malpractice action will depend upon the attorney’s ability to anticipate those issues and present them in the light that is most favorable to their client.¹⁷² The ability to do that might ultimately impact whether the attorney becomes an actual defendant in the rare “case-within-a-case-*within-a-case*.”¹⁷³

169. See, e.g., *Preferred Pers. Servs.*, 902 N.E.2d at 157 (discussing that the issue of collateral estoppel needs to be applied narrowly which, as a result, can lead to a variety of applications depending on the interpretation of the court).

170. Blum, *supra* note 6, at *2.

171. See *Stanfield*, 494 S.W.3d at 93.

172. See *Transcraft*, 39 F.3d at 815 (discussing incompetence as a factor for defendant attorneys in malpractice suits).

173. See *Mattco Forge*, 60 Cal. Rptr. 2d at 787 (discussing the varying terminology that surrounds legal malpractice cases).