The Case-within-the-Case in Litigation Malpractice

By Zachary J. Freeman

Litigation malpractice plaintiffs carry a unique burden. In addition to having to prove that its lawyer was negligent, the plaintiff has to prove that it would have prevailed in the underlying case, which is commonly referred to as the "case-within-the-case." The case-within-the-case raises complex evidentiary and procedural questions because the underlying case was often litigated in a different court under different evidentiary standards and with a different burden of proof. This article identifies some of the more complex issues that frequently arise when litigating the case-within-the-case and provides some general guidance to lawyers seeking to advise their clients on this unique and complicated aspect of litigation malpractice.

Who decides?

Legal malpractice claims are typically tried in front of a jury. While fact questions, such as proximate causation, are generally reserved for the jury, the jury in litigation malpractice cases may not be permitted to decide the key factual question of proximate causation. In *Governmental Interinsurance Exch. v. Judge,* 221 Ill. 2d 195, 214 (2006), the Illinois Supreme Court held, in the context of appellate litigation malpractice, that proximate causation is a question of law that must be resolved by the judge. In *Governmental Interinsurance Exch.,* the malpractice plaintiff, who was the defendant in the underlying litigation, alleged that its lawyer failed to perfect its appeal, in which it would have sought review of the trial court's ruling that the Tort Immunity Act did not immunize it from liability. The Supreme Court ruled that whether the appeal would have prevailed was a question of law that "does not usurp the fact-finding role of a jury, but rather reflects the constitutionally recognized role of the court to interpret and declare the law." *Id.* at 211. In other words, because the underlying trial court decided the relevant issue as a matter of law, the trial court in the malpractice action should do the same when resolving the case-within-the-case. *Id.*

Additionally, when proximate causation turns on discretionary decisions that would have been made by the judge in the underlying case, proximate causation should be decided by the judge rather than the jury in the malpractice action. As the Illinois Appellate Court explained in *First Nat'l Bank of LaGrange v. Lowrey,* 375 Ill. App. 3d 181, 203 (1st Dist. 2007):

> We do not believe that the jury should assume a role in a legal malpractice case that the legislature has specifically committed to the discretion of the trial court. To do so would be contrary to the legislature's intent and

would give the jury a power in the context of a legal malpractice case that it would not otherwise possess.

The question is not what the specific judge "would have done" in the case-within-the case but what a reasonable trial court judge "should have done" in the underlying action but for the alleged malpractice. *O'Neil v. Cont'l Bank, N.A.*, 278 Ill. App. 3d 327, 336-37 (1st Dist. 1996). What a judge should have done is a question of law that should be answered by the court rather than by a jury.

How much needs to be decided?

A question that is often raised is whether it is necessary to retry the entire case. The answer to this question depends on the nature of the alleged malpractice. *See Lariviere, Grubman & Payne, LLP v. Phillips,* 07-CV-01723-WYD-CBS, 2011 WL 650001, at *10 (D. Colo. Feb. 11, 2011) ("[T]he underlying case may be relitigated only to the extent necessary for determining whether there is a sufficient causal connection between the alleged act(s) of malpractice and the malpractice claimant's injury."). If the alleged malpractice was the failure to file a timely complaint, the entire case would need to be litigated because what would have occurred in the absence of the malpractice is a complete unknown. Alternatively, if the alleged malpractice occurred at the end of the trial, such as by failing to tender the correct jury instruction, there would be little need to retry the case-within-a-case because the trial record would exist and the parties would likely be bound by what actually occurred to the extent it was unrelated to the alleged negligence. In practice, legal malpractice plaintiffs tend to allege numerous negligent acts, which tend to put much, if not all, of the underlying legal proceedings at issue.

What issues can be raised?

Defendants in malpractice actions often seek to raise additional defenses that were not raised in the underlying proceeding. While Illinois courts have not expressly addressed what additional defenses can be raised, courts from other jurisdictions have held that malpractice defendants can only raise issues that are causally connected to the alleged malpractice or damages. In *Lariviere, Grubman & Payne, LLP,* the plaintiff sued his attorneys alleging that their negligence caused it to lose a patent infringement action. The attorneys asserted in the malpractice action, for the first time ever, that the plaintiff lacked standing to recover damages because it did not own the relevant patent at the time of the underlying litigation. *Id.* The district court refused to enter summary judgment in favor of the defendants on this basis for two reasons. *Id.* It found that there were disputed facts regarding whether the attorneys knew or should have known of this issue at the time of the trial such that it could have been cured. *Id.* Next, it held that the defendants were bound by the implicit finding in the underlying proceeding that the plaintiff owned the patent because the issue of ownership was not related in any way to the alleged negligence. *Id.*

There are certain situations, however, when defendants can raise new issues. They can do so if they can prove that the defense would have been raised in the absence of the alleged negligence. For example, in *Suder v. Whiteford, Toyalor & Preston, LLP,* 992 A.2d 413, 419-21 (Md. April 9, 2010), the defendants failed to file a timely motion to extend a jurisdictional deadline. They claimed, however, that the plaintiff was not damaged by their negligence because a prior extension, which was obtained by the plaintiff *pro se*, was void. The appellate court held that the defendants could raise the issue of the validity of the prior extension if they could prove that the underlying defendant would have raised this issue in the absence of the alleged negligence. In sum, malpractice defendants can only raise new defenses if they can prove that the issue would have been raised in the underlying litigation but for the alleged malpractice. *See also Alva v. Hurley, Fox, Selig, Caprari & Kelleher,* 593 N.Y.S.2d 728, 731-32 (N.Y. Sup. 1993) (defendants cannot assert defenses waived in underlying litigation but can introduce new evidence relevant to value of underlying case).

What evidence is admissible?

An issue raised by the case-within-the-case is what evidence rules apply. It is important to recognize that different evidentiary rules may apply to the case-within-a-case and to the malpractice case. If the malpractice action is pending in state court and the underlying case was pending in a federal court, or if the malpractice occurred in an administrative proceeding, different evidentiary rules will govern the malpractice case and the case-within-a-case. Even when the same evidentiary rules apply to both proceedings, the rules could be applied differently. For example, the admissibility of certain types of evidence depends on the identity of the parties, such as admissions by a party-opponent. In the malpractice action, statements made by the underlying defendant may be admissible in the case-within-a-case but may be hearsay in the negligence

case, and statements made by the attorneys may be admissible in the negligence case but may be hearsay in the case-within-a-case. *See Mattson v. Schultz,* 145 F.3d 937 (7th Cir. 1998). Practitioners need to pay close attention to this issue to determine if the evidence that is admitted is sufficient to prove the various elements of the lawsuit.

Proving collectibility?

If the litigation malpractice plaintiff proves the case-within-the-case and proves that its lawyer was negligent, many plaintiffs will still have not yet proven their right to recover damages. When the litigation malpractice plaintiff was the plaintiff in the underlying litigation, it appears to have the burden of proving that it would have collected the judgment it would have obtained in the case-within-a-case. The Seventh Circuit, in *Klump v. Duffus,* 71 F.3d 1368, 1374 (7th Cir. 1995), explained that the plaintiff has the burden of proving "the amount she would have actually collected from the original tortfeasor as an element of her malpractice claim," i.e., the plaintiff has to prove the extent to which it would have collected the judgment. *See also Sheppard v. Krol,* 218 Ill. App. 3d 254, 259 (1st Dist. 1991) (plaintiff must plead and prove the existence of a solvent defendant); *but see Bloome v. Wiseman, Shaikewitz, McGivern, Wahl, Flavin & Hesi, P.C.,* 279 Ill. App. 3d 469, 478 (5th Dist. 1996) (plaintiff does not have to prove collectability). Courts impose this additional burden is necessary to ensure that the plaintiff does not reap a windfall and is only put in the place that it would have been in but for the alleged malpractice. After all, a plaintiff who fails, due to its lawyer's negligence, to secure n judgment against an uncollectible defendant has not been damaged.

There are some limited exceptions to the principle of putting the plaintiff in the same place as it would have been but for the alleged malpractice. When addressing the questions of whether the underlying judgment should be reduced by the amount of attorneys' fees the plaintiff would have incurred to obtain the judgment, Illinois courts have refused to deduct attorneys' fees. *Bloome,* 279 Ill. App. 3d at 482. The stated reason for this refusal is that the fees in the two actions are assumed to be "essentially equal" and it would be inequitable to require the plaintiff to pay the fees it would have paid in the underlying action to obtain the judgment as well as the fees in the malpractice action. *Id.*

Conclusion

The case-within-a-case is a unique aspect of legal malpractice that requires one court to essentially decide two cases–the underlying case and the negligence case. Not surprising, the dual nature of this proceeding raises many complicated and interesting evidentiary and procedural issues. This article identified a handful of these issues but was not intended to be an exhaustive list or survey.

Practitioners who represent either plaintiffs or defendants need to be aware of these unique issues to ensure that they don't unwittingly make an error that could lead to an even more complex situation: "the-case-within-the-case-within-the-case." Indeed, if legal malpractice occurred in a legal malpractice action, the trial court would have to try three cases–the negligence case against the lawyer, the underlying negligence case against the underlying lawyer, and the original case-within-a-case. ■

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