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## **Litigating the Legal Malpractice Case**

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## I. [6.1] INTRODUCTION

Legal malpractice filings are on the rise. Increasingly, clients who believe they have not fared well in their legal matters are looking to their own lawyers for relief. Many practitioners can recall a time when legal malpractice litigation was rare and caselaw on legal malpractice litigation was virtually nonexistent. Lawyers navigating legal malpractice waters employed litigation techniques learned in medical malpractice and other professional liability litigation involving disputed professional standards of care. But, because legal malpractice actions are uniquely dependent on predicate rules of law and court decision-making and are usually structured in the manner of a “case within the case,” they necessarily follow litigation rules and techniques not found in other professional liability actions. While legal malpractice filings are on the rise, trials of legal malpractice still tend to be the exception due to many factors. Even in cases that may be tried before a jury, very significant issues of the underlying case or the law of the underlying case may be decided by the judge rather than by the jury. Due to the dependence on predicate law, many legal malpractice cases are highly conducive to early determination on motions to dismiss or for summary judgment. Because the cases tend to be heavily laden with legal considerations, litigation of the legal malpractice case involves a great deal more than the marshaling of facts.

Other factors make legal malpractice litigation unique. For example, while there is a specific statute of limitations applied to legal malpractice, determining the accrual date of the cause of action can be elusive. Whether a cause of action is premature or ripe is often a difficult issue to resolve. Even when that answer is clear, there are still considerations of whether a tolling agreement would be a better course of action to allow the underlying legal matters to run their course. Often, the lawyer handling a transaction or litigation may have committed an error, but the client may still have full or limited recourse against responsible parties in the underlying matter. Other unique facets of legal malpractice substantive law, particularly the proximate causation requirement of proving “but for” causation, will influence litigation practice and strategy. Proximate cause issues specific to legal malpractice litigation may include whether the underlying case within a case would have succeeded in the client’s favor and whether the potential responsible parties would have been solvent (or “collectible”) even if “success” had occurred.

Other considerations include the growing use of third-party actions in legal malpractice litigation. Because the underlying matter that leads to the legal malpractice action often sees the plaintiff involved in more than one attorney-client relationship and because this relationship is likened to one of agency, considerations of the errors or omissions of other counsel, both prior and subsequent, will shape litigation decisions. Remedies or defenses may exist based on the course of conduct and advice of other lawyers who may share fault or who may have influenced the outcome in the underlying matter.

The underlying substantive areas of law giving rise to the case often strongly influence legal malpractice litigation. In areas of alleged appellate malpractice, the case may turn on legal considerations that the court will decide; for example, how would the appeal have been decided in the “but for” world? An underlying transactional dispute might turn on questions of enforceability of the underlying botched deal or collectibility of its benefits. Matrimonial and bankruptcy disputes may involve matters not typically decided by a jury and, therefore, may tip more heavily

in favor of a determination by a judge. For instance, the question of how to divide marital property equitably among spouses may not be an appropriate issue for a jury on the premise that the underlying matrimonial case could not be submitted to a jury as a matter of law and public policy. Similarly, a determination of the outcome of a bankruptcy proceeding might involve questions more appropriately submitted to the judge as to how the underlying bankruptcy court would have ruled on factual as well as legal issues.

Also, a settlement of the underlying matter in the litigation may have a profound effect, and the extent to which an underlying settlement can potentially foreclose legal malpractice remedies must be understood.

The proof of facts in legal malpractice cases calls for creative judgment. Pretrial motions, introduction of documentary evidence (such as billing records), presentation of fact and opinion testimony, proof of the applicable standard of care, use of the attorney-client privilege, jury instructions, and even whether a jury or the court should decide certain issues all raise considerations unique to legal malpractice litigation. This chapter provides a basic outline of the areas of consideration and identifies the procedure and strategies employed by plaintiffs and defendants in legal malpractice litigation, focusing on Illinois law and procedure.

## **II. COMMENCING THE LEGAL MALPRACTICE CASE**

### **A. [6.2] Plaintiff's Pretrial Investigation**

Legal malpractice litigation can be very expensive and labor intensive for several reasons:

1. Because the plaintiff often must win two cases — the underlying matter and the malpractice case — the amount of resources (both in time and money) needed to litigate naturally increases.

2. The prominent involvement of expert witnesses adds to the cost of litigation. For example, if the alleged malpractice relates to the failure to file a personal injury claim within the applicable statute of limitations, the testimony of treating physicians, or even of a retained medical expert, may be necessary to prove the nature and extent of the plaintiff's injuries. Similarly, an accountant, economist, or valuation expert may be needed to show damages when the underlying matter is of a commercial nature or involves a claim for lost earnings.

3. An expert attorney witness is almost always required to establish that the defendant attorney breached the standard of care. *See Barth v. Reagan*, 190 Ill.App.3d 516, 546 N.E.2d 87, 137 Ill.Dec. 463 (2d Dist. 1989), *aff'd*, 139 Ill.2d 399 (1990).

Because the investment necessary to “win” a legal malpractice action (either through judgment or settlement) can be so significant, the importance of a thorough prefiling investigation cannot be overemphasized.

## 1. [6.3] Existence of the Attorney-Client Relationship

The first consideration that must be addressed is whether an attorney-client relationship even existed between the parties. Attorneys subjected to claims of malpractice will sometimes deny having represented the complaining party.

Under Illinois law, the attorney-client relationship is consensual and arises only when both the attorney and the client have consented to its formation. The client must manifest his or her authorization that the attorney act on his or her behalf, and the attorney must indicate his or her acceptance of the power to act on the client's behalf. An attorney's duty to a client is measured by the representation sought by the client and the scope of the authority conferred. Although, as a general rule, an attorney owes a duty only to one who is a client, an exception has been recognized when an attorney is hired by a client specifically for the purpose of benefiting a third party. *See Simon v. Wilson*, 291 Ill.App.3d 495, 684 N.E.2d 791, 225 Ill.Dec. 800 (1st Dist. 1997) (and cases cited therein). For a more complete discussion of third-party liability, refer to Chapter 3 of this handbook.

One area in which Illinois courts have found that this essential relationship generally does not exist is the one between a corporation's shareholder and the corporation's attorney. A shareholder who believes that the conduct of the corporation's counsel has caused him or her damage normally cannot, in his or her individual capacity, sue that attorney for legal malpractice because the attorney is deemed to represent only the corporation and owes no duty to the shareholder. *See, e.g., Felty v. Hartweg*, 169 Ill.App.3d 406, 523 N.E.2d 555, 119 Ill.Dec. 799 (4th Dist. 1988). *Compare Leaning Curve International, Inc. v. Seyfarth Shaw, LLP*, 392 Ill.App.3d 1068, 911 N.E.2d 1073, 331 Ill.Dec. 843 (1st Dist. 2009) (holding company might assign its malpractice claim to shareholders as part of transfer of assets in merger). At the same time, in small, closely held corporations, a situation is sometimes present in which (usually in the name of saving money) an attorney agrees to represent the corporation's interests and those of one or more shareholders, creating the potential for a claim against the attorney of conflict of interest if a problem later arises between the corporation and any of its shareholders.

Illinois courts have also found that the attorney-client relationship does not exist between the beneficiaries of their deceased father's estate and a lawyer hired by a public administrator to assist in the administration of the estate. The attorney represents the administrator and not the beneficiaries and therefore owes no duties to them. *Grimes v. Saikley*, 388 Ill.App.3d 802, 904 N.E.2d 183, 328 Ill.Dec. 421 (4th Dist. 2009).

Similarly, an attorney may contend that while he or she and the client met to discuss possible representation, the meeting did not lead to an agreement to represent the client. The attorney may also respond that he or she was retained by the client for a limited purpose and that the complaint concerns a matter outside the agreed scope of representation. It should be noted that a claim could exist as a result of an attorney's failure to explain to a client other courses of action that may be available beyond the one that the attorney agrees to undertake. *See Keef v. Widuch*, 321 Ill.App.3d 571, 747 N.E.2d 992, 254 Ill.Dec. 580 (1st Dist. 2001). See also Chapter 5 of this handbook.

Evidence that supports the presence of the attorney-client relationship may include a written retainer agreement or an attorney's invoice for services rendered. However, the lack of a written retainer agreement should not be deemed fatal since the Illinois Rules of Professional Conduct (RPC) require only that contingent fee agreements be in writing (RPC 1.5(c)), and experience tells us that not all attorneys have their clients execute written retainer agreements (regardless of whether the matter is handled on a contingent basis). Moreover, attorneys who have ongoing relationships with clients may not document each assignment that the lawyer agrees to undertake.

If no written retainer exists, the reviewing attorney should actively interview the client as to the facts that cause that client to believe a lawyer was representing him or her. Also, other documents, such as correspondence between the client and counsel or the client's notes of communications with the attorney, may support the conclusion that the attorney was representing the client as to a particular matter.

Invoices for services rendered that an attorney sends to a client (and proof of payment) are strong indicia of the existence and scope of the attorney-client relationship. The attorney's billing records can play a key role in the litigation of a legal malpractice claim — both in its prosecution and defense — as they reflect the attorney's contemporaneous conduct as it relates to the client. As part of the pretrial investigation, the reviewing attorney should obtain from the client any retainer agreement, all correspondence between the client and counsel, all notes, all invoices the attorney submitted to that client, as well as any proof of payment the client may possess.

## **2. [6.4] The Underlying Matter**

The core of the legal malpractice claim is the “underlying matter.” Often, the underlying matter concerns a claim that either should have been the subject of litigation or a claim that was the subject of litigation that the client believes was handled improperly. A classic illustration of a claim that “should have been brought” occurs when the handling attorney fails to file an action within the applicable statute of limitations. Examples of malpractice claims arising from a filed litigation include the failure of the attorney to communicate a settlement offer or the failure to comply with court rules that leads either to the exclusion of evidence favorable to the client or to an adverse result.

Generally, the focus of any defense to a “failure to file timely” case will be on whether the client would have succeeded if the case had been timely filed, as most attorneys acknowledge the duty to file a claim within the statute of limitations. The “case within the case” should be investigated in the same way as if the reviewing attorney was handling only that action. So, if the underlying matter involved a personal injury, the attorney should obtain all records relating to that occurrence (such as police reports, medical records, employment records, etc.) and should interview all relevant witnesses, etc. In other words, even if the attorney's liability is clear, the “no harm, no foul” defense will be heard loudly if the underlying case is weak from the plaintiff's perspective.

As to a litigated matter, the attorney should examine the court file. The reviewing attorney should not rely solely on the client (or any referring attorney) to provide the components of that file. If court proceedings are relevant to the viability of the legal malpractice claim, appropriate transcripts should be ordered.

Also, the potential malpractice defendant may possess relevant information that he or she is obligated to turn over to the client. Under RPC 1.16(d), an attorney must turn over “papers and property” to which the client is entitled.

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### PRACTICE POINTERS

- ✓ Supreme Court Rule 769 requires an attorney to maintain all financial records related to the attorney’s practice for not less than seven years. These include bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns, and tax reports.
  
  - ✓ A client or his or her counsel may request a copy of the client’s “file” pre-suit. With the exception of work product, 735 ILCS 5/8-2005 requires that a client be allowed to examine or copy his or her file, upon written request and payment of copying fees, within 60 days of making the request. The response may be made also by CD-ROM, DVD, or other electronic format, when so requested. However, if the client has unpaid bills for legal services or expenses or liens, the statute does not apply. The former lawyer may claim a possessory or “retaining” lien on the client’s property (*Upgrade Corp. v. Michigan Carton Co.*, 87 Ill.App.3d 662, 410 N.E.2d 159, 43 Ill.Dec. 159 (1st Dist. 1980)), which a court may honor. *See also Lucky-Gold Star International (America), Inc. v. International Manufacturing Sales Co.*, 636 F.Supp. 1059 (N.D.Ill. 1986). Therefore, the reviewing lawyer should determine the status of unpaid bills and be prepared to bring an appropriate motion to obtain needed papers and property of the client and also be prepared to address the possessory lien rights of the former attorney.
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Although a possibly awkward task, the reviewing attorney should request the opportunity to examine the former counsel’s file and copy those documents necessary to evaluate the legal malpractice claim. The attorney should make available all correspondence, pleadings, transcripts, electronically stored records, and invoices in his or her file.

In addition, the reviewing attorney should request that the former lawyer and/or law firm take affirmative action to prevent the destruction of documents, including electronically stored information relevant to the representation. This concept is sometimes referred to as a “legal hold” or “document hold.” The reviewing attorney should request that the law firm or attorney issue a “legal hold notice” to its attorneys and staff stating that a legal hold exists and that they should preserve documents and electronically stored information that may be relevant to the representation.

The handling of transactional matters is also a source of potential legal malpractice claims. Unforeseen or harmful consequences to a client from, for example, a real estate contract, business purchase agreement, employment contract, or estate or tax planning provide instances in which a handling attorney’s conduct may come into question. 735 ILCS 5/8-2005 (Attorney’s Records) specifically exempts attorney work product from the records that an attorney is obligated to provide upon a demand outside of litigation. The question of privilege and work product doctrine in legal malpractice litigation is one the court must often address.

It is unclear in Illinois whether an attorney must also make available documents that would be considered work product, such as research notes, internal memoranda, etc. The question of privilege in legal malpractice litigation is one the court must often address.

Also, a client will sometimes come to a lawyer complaining that, as a result of his or her former attorney's actions, some governmental body, regulatory authority, or other party learned of that client's involvement in illegal or immoral conduct, and the client was stopped from perpetrating that conduct, resulting in some alleged loss. Generally, Illinois law will not allow a client to bring a legal malpractice claim under these circumstances even if a different result would have occurred but for the attorney's actions in the underlying matter. *Makela v. Roach*, 142 Ill.App.3d 827, 492 N.E.2d 191, 96 Ill.Dec. 949 (2d Dist. 1986). See §6.20 below for a discussion on unclean hands or actions based on illegal or immoral conduct.

If the potential legal malpractice claim involves the lawyer's failure to file an action against a third party, the reviewing attorney should consider whether that claim can still be brought because, for example, the statute of limitations has not, in fact, expired. If a viable claim can still be brought against a viable defendant, the legal malpractice claim will be dismissed. *See Land v. Greenwood*, 133 Ill.App.3d 537, 478 N.E.2d 1203, 88 Ill.Dec. 595 (4th Dist. 1985); *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill.App.3d 618, 773 N.E.2d 1192, 266 Ill.Dec. 122 (1st Dist. 2002); *Nettleton v. Stogsdill*, 387 Ill.App.3d 743, 899 N.E.2d 1252, 326 Ill.Dec. 601 (2d Dist. 2009). In that situation, not only may the attorney malpractice claim be dismissed, but also the reviewing attorney may become a defendant in a future legal malpractice claim if the statute of limitations bars that underlying claim. *See, e.g., Land v. Auler*, 186 Ill.App.3d 382, 542 N.E.2d 509, 134 Ill.Dec. 330 (4th Dist. 1989).

However, the fact that another party besides the former attorney may share culpability for the wrong that has been done to the plaintiff does not mean that the plaintiff must exhaust all of his or her remedies against the nonlawyer tortfeasor before seeking recovery against the attorney. *See Alper v. Alzheimer & Gray*, 65 F.Supp.2d 778 (N.D.Ill. 1999) (plaintiff allowed to pursue legal malpractice claim against attorney who represented client in sale of business transaction that failed to reserve to client portion of business, without first having to litigate to resolution claim against buyer for taking control of unreserved business). In other words, the mere fact that there exists more than one source of recovery for the same wrong should not immunize the culpable attorney from a lawsuit. Similarly, a legal malpractice plaintiff does not have the burden of proving the exhaustion of all avenues of appeal on the underlying claim in order to state a legal malpractice claim. *Bloome v. Wiseman, Shaikewitz, McGivern, Wahl, Flavin & Hesi, P.C.*, 279 Ill.App.3d 469, 664 N.E.2d 1125, 216 Ill.Dec. 197 (5th Dist. 1996).

A settlement in the underlying action does not preclude the potential plaintiff from pursuing a legal malpractice claim against an attorney who may have committed malpractice in the handling of that action. It is possible that the plaintiff was compelled to settle the underlying matter due to the attorney's malfeasance. Under Illinois law, a plaintiff can bring a legal malpractice claim under these circumstances but still must prove that he or she would have obtained more or less damages but for the defendant attorney's conduct. *See McCarthy v. Pedersen & Houpt*, 250 Ill.App.3d 166, 621 N.E.2d 97, 190 Ill.Dec. 228 (1st Dist. 1993); *Webb v. Damisch*, 362 Ill.App.3d 1032, 842 N.E.2d 140, 299 Ill.Dec. 401 (1st Dist. 2005); *Weisman v. Schiller, Ducanto*

*& Fleck, Ltd.*, 368 Ill.App.3d 41, 856 N.E.2d 1124, 306 Ill.Dec. 29 (1st Dist. 2006); *Merritt v. Hopkins Goldenberg P.C.*, 362 Ill.App.3d 902, 841 N.E.2d 1003, 299 Ill.Dec. 271 (5th Dist. 2005) (holding that although plaintiff presented sufficient evidence that defendants breached standard of care, plaintiff failed to provide sufficient evidence to show that but for attorney's negligence, they could have recovered larger settlement). The rationale for this rule is that to hold that the settlement of an underlying action bars a subsequent legal malpractice claim "could create ethical problems where an attorney, knowing that he mishandled a case, encourages his client to settle in order to shelter himself from a malpractice claim." *McCarthy, supra*, 621 N.E.2d at 101 – 102. For cases agreeing with the reasoning of *McCarthy* but holding the plaintiff could still not prove a legal malpractice claim, see *Brooks v. Brennan*, 255 Ill.App.3d 260, 625 N.E.2d 1188, 193 Ill.Dec. 67 (5th Dist. 1994); *Glass v. Pitler*, 276 Ill.App.3d 344, 657 N.E.2d 1075, 212 Ill.Dec. 730 (1st Dist. 1995); *Fox v. Berks*, 334 Ill.App.3d 815, 778 N.E.2d 1141, 268 Ill.Dec. 519 (1st Dist. 2002).

As part of the pretrial investigation, the attorney should consider whether the plaintiff is able to meet his or her burden to plead and prove that the defendant in the underlying matter was "solvent." To show a defendant is "solvent" does not require proof of solvency in a specific dollar amount (or that the entire amount claimed was collectible), but it requires proof that the damages could in part or in whole have been realized had the attorney not been negligent. *Bloome, supra*. For example, in *Bloome*, the appellate court found that the plaintiff presented sufficient proof of solvency in his legal malpractice action against the attorneys who represented him in the underlying medical malpractice action when they presented evidence that the physician in the underlying action had the ability to generate and earn income as a licensed physician in practice and on the staff of at least one hospital and that the physician had a \$2 million malpractice insurance policy. 664 N.E.2d at 1131. See also *Nika v. Danz*, 199 Ill.App.3d 296, 556 N.E.2d 873, 145 Ill.Dec. 255 (4th Dist. 1990) (noting that plaintiff could have presented evidence of underlying defendant's solvency through officer of company, as opposed to through plaintiff's general testimony); *Visvardis v. Ferleger*, No. 1-05-3969, 2007 Ill.App. LEXIS 822 at \*14 (1st Dist. July 27, 2007) ("plaintiff must plead facts supporting an inference that after the date of the malpractice, and some time before the judgment against the underlying defendant would become unenforceable due to its age, the underlying defendant would have some funds available for payment of some part of the damages").

Finally, when a judge makes a ruling after reviewing the underlying case, an attorney cannot be held accountable for the court's acceptance of a legally unsound basis for granting a summary judgment motion against the plaintiff. *Cedeno v. Gumbiner*, 347 Ill.App.3d 169, 806 N.E.2d 1188, 282 Ill.Dec. 600 (1st Dist. 2004).

### **3. [6.5] Considerations of Limitations and Prematurity**

Section 13-214.3(b) of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, requires that a legal malpractice action "be commenced within two years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." The provision also contains a statute of repose barring (with certain exceptions) a claim more than six years after the date on which the act or omission occurred.

One of the most difficult tasks for the legal malpractice plaintiff's counsel is determining whether the plaintiff has suffered cognizable damages or injury to support a legal malpractice claim, and, if so, when that injury occurred so that any complaint is filed within the statute of limitations and the six-year statute of repose. A considerable body of Illinois caselaw has developed on the question of "prematurity" or "ripeness" of legal malpractice claims that should be reviewed. See the discussion in §6.16 below regarding statutes of limitation.

The quandary of whether the claim is "ripe" can appear when it is unclear how much, if any, damage the client has suffered due to the lawyer's conduct. In determining whether an actionable injury has occurred, it is the fact of "damage" and not the extent of that damage that makes the action "ripe." Damages are speculative only if their existence itself is uncertain and not if their exact amount is uncertain or yet to be fully determined. *See, e.g., Palmros v. Barcelona*, 284 Ill.App.3d 642, 672 N.E.2d 1245, 220 Ill.Dec. 233 (2d Dist. 1996).

For example, a client may seek assistance from the impact of an adverse judgment even though that judgment is under appeal. Since the appeal could result in the vacation of that judgment, a first reaction might be that the client does not yet have an actionable malpractice claim. However, under Illinois law, the entry of the judgment at the trial court level is a sufficient injury to trigger the running of the statute of limitations even though the appeal may result in the reversal or overturning of the unfavorable judgment. *See Belden v. Emmerman*, 203 Ill.App.3d 265, 560 N.E.2d 1180, 148 Ill.Dec. 583 (1st Dist. 1990) (clients' cause of action against former attorneys for legal malpractice accrued, for statute of limitations purposes, upon trial court's entry of settlement order in underlying action, as opposed to when order was affirmed on appeal, even though clients alleged that element of damages was not present until affirmance). *See also Warnock v. Karm Winand & Patterson*, No. 1-06-0341, 2007 Ill.App. LEXIS 737 (1st Dist. June 29, 2007) (reversing grant of summary judgment on ground that cause of legal malpractice could not accrue prior to entry of adverse judgment, settlement, or dismissal of underlying action).

On the other hand, the fact that an attorney's advice arguably leads to litigation against the client does not, by itself, mean that the client has suffered an injury, even if the client has to incur legal fees to defend himself or herself. In *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill.App.3d 349, 703 N.E.2d 473, 234 Ill.Dec. 612 (1st Dist. 1998), counsel advised a client that he could change jobs and solicit customers without violating his employment agreement. The client followed the advice and took a new position, but his former employer then sued for breach of that agreement. When the employee sued his advising attorney, the appellate court ruled that the claim was premature as it could not be determined if the advice had actually damaged the client until the underlying lawsuit was resolved. The client's payment of legal fees to defend his employer's lawsuit was not sufficient "damage" to trigger the running of the statute of limitations.

Unfortunately, it may be less than perfectly clear if a client has incurred sufficient "damage" to start the statute of limitations (assuming there is no issue concerning "discovery"). Usually, the attorney can in good faith (meaning, in compliance with S.Ct. Rule 137) point to a date from which to measure the running of the two-year statute of limitations. Given the option between having a complaint dismissed without prejudice because it is not yet ripe and having one dismissed with prejudice because it is untimely filed, the conservative approach would dictate

that the lawsuit be filed prior to the two-year anniversary from which the attorney believes the claim may have accrued. If a court holds that a legal malpractice complaint is premature at the time it is filed, the court should dismiss that filing without prejudice so as not to bar a possible claim if the client is ultimately damaged by the lawyer's conduct. 703 N.E.2d at 479 – 480.

Another possible strategy for a plaintiff or defendant to consider is to request a stay of the legal malpractice action when a judgment in the underlying case has been entered against the plaintiff, but the appeal of that judgment is still pending. *See Estate of Bass v. Katten*, 375 Ill.App.3d 62, 871 N.E.2d 914, 187, 313 Ill.Dec. 187 (1st Dist. 2007) (affirming trial court's granting of plaintiff's motion to stay plaintiff's "premature" legal malpractice action while appeal of adverse judgment was pending).

Another possible strategy that appears more frequently is joining the legal malpractice with the underlying claim. This tactic was employed in *Preferred Personnel Services, Inc. v. Meltzer, Purtil & Stelle, LLC*, 387 Ill.App.3d 933, 902 N.E.2d 146, 327 Ill.Dec. 391 (1st Dist. 2009). The court noted, however, that generally malpractice cases should not proceed simultaneously with the underlying claim and that the malpractice case was not "ripe" until the underlying claim was dismissed. Further, the ultimate dismissal was not binding as collateral estoppel on the lawyers who were free to raise all defenses to the underlying case, including that the dismissal was in error.

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#### PRACTICE POINTER

- ✓ When in doubt, do not delay filing on prematurity grounds. If the defendant moves or judicial economy supports a deferral, the case can be abated temporarily by stay or dismissal without prejudice pending the outcome of related underlying litigation or appeal. *Id.*; *Schulte v. Burch*, 151 Ill.App.3d 332, 502 N.E.2d 856, 104 Ill.Dec. 359 (4th Dist. 1986); *Bartholomew v. Crockett*, 131 Ill.App.3d 456, 475 N.E.2d 1035, 86 Ill.Dec. 656 (1st Dist. 1985); *Lucey, supra*; *Estate of Bass, supra*.
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#### 4. [6.6] Tolling Agreements

A tolling agreement provides an alternative to filing a lawsuit when material "uncertainty" exists as to whether a claim has accrued because the underlying matter has not sufficiently resolved itself.

The purpose of the tolling agreement is to obtain the prior counsel's agreement to freeze the running of the statute of limitations, the statute of repose, and other time-based defenses (such as laches) as of a particular date. Tolling agreements usually provide for a date or mechanism for termination and will also allow for amendment and extensions by mutual agreement. Counsel for the complaining client should be careful to include a tolling of the statute of repose and other time-based defenses as well as the statute of limitations or else risk the loss of a claim if a lawsuit is ultimately filed. If the potential defendant attorney has insurance, the client's attorney should verify that the insurer has approved its insured entering into a tolling agreement so as not to jeopardize coverage.

Even when there is no issue concerning the “accrual” date, a tolling agreement can allow for the informal exchange of information with the goal of reaching an amicable resolution of a dispute before a lawsuit is filed against the former attorney. Among other things, significant cost savings can result, and the former attorney can avoid the negative stigma that can result from being named a legal malpractice defendant. Additional discussion of tolling agreements and an exemplar of one are found in Chapter 5 of this handbook.

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#### **PRACTICE POINTER**

- ✓ Due to considerations of accrual and the possibility that an action already accrued may be premature, consideration should be given to the use of tolling agreements, particularly if the underlying case or matter remains viable, pending, or undetermined. When using tolling agreements, it is advisable that the defendant obtain the consent and acknowledgment of any legal malpractice liability insurer so that there are no concerns that deferring litigation of a matter will not negatively impact coverage.
  
  - ✓ A tolling agreement may be for a specified time and extended by amendment. However, repetitious amendments should be carefully written to avoid a waiver due to poor drafting, as occurred in *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill.App.3d 632, 888 N.E.2d 657, 321 Ill.Dec. 138 (1st Dist. 2008) (fifth amended tolling agreement extending four years beyond passing of statute of limitations failed as matter of contract interpretation). *See also Camico Mutual Insurance Co. v. Citizens Bank*, 474 F.3d 989 (7th Cir. 2007) (misreading of tolling agreement leads to time-barred claim for accounting malpractice).
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### **5. [6.7] Use of Expert/Consultant Prior to Filing Suit**

Unlike the medical malpractice area (735 ILCS 5/2-622), Illinois law does not require that a legal malpractice complaint attach a certificate from an “expert” attorney attesting to the meritorious nature of the claim. Yet, in making a prima facie case, a legal malpractice plaintiff, like a medical malpractice plaintiff, must use expert testimony to establish the standard of care against which the attorney’s conduct is examined. The failure to present expert testimony is generally fatal to a legal malpractice action, although an exception exists when the attorney’s negligence is so apparent that a layperson would have no difficulty seeing it. *Barth v. Reagan*, 139 Ill.2d 399, 564 N.E.2d 1996, 151 Ill.Dec. 534 (1990); *Los Amigos Supermarket, Inc. v. Metropolitan Bank & Trust Co.*, 306 Ill.App.3d 115, 713 N.E.2d 686, 239 Ill.Dec. 155 (1st Dist. 1999). Also, an attorney can be deemed to have admitted the standard of care in his or her answer to the complaint. *See, e.g., Nettleton v. Stogsdill*, 387 Ill.App.3d 743, 899 N.E.2d 1252, 326 Ill.Dec. 601 (2d Dist. 2009).

Given the ultimate need for expert testimony, and in light of the dictates of S.Ct. Rule 137, it is prudent for the reviewing attorney to have an attorney with appropriate expertise examine the potential legal malpractice claim as part of the pre-filing investigation. For example, if an issue exists concerning the handling of a real estate transaction, an attorney with expertise in that type

of transaction should be consulted to determine whether the potential plaintiff can assert a good-faith claim that a deviation from the standard of care occurred. The more technical or specialized the area of law involved in the underlying matter, the greater the need for consultation prior to filing of the lawsuit. If an attorney cannot find a consultant to support a claim of breach prior to the filing of a complaint, consideration should be given to declining the case.

## **B. Pleadings**

### **1. [6.8] The Complaint**

As discussed below and in Chapter 3 of this handbook, a number of Illinois decisions have addressed the question of the plaintiff's burden in stating a cause of action for legal malpractice. The plaintiff's counsel, of course, should review this law prior to filing a complaint. A few points, however, are worth observing.

Beyond the standard elements that should be pled, the plaintiff's attorney should determine whether any facts need to be alleged relating to the statute of limitations. If the complaint is being filed more than two years after the date the plaintiff suffered actual damage, but less than two years from the date of discovery, the complaint should contain facts indicating why the plaintiff did not become aware of either his or her injury, or of the facts indicating that it was wrongfully caused during that two-year period. *Ogle v. Hotto*, 273 Ill.App.3d 313, 652 N.E.2d 815, 210 Ill.Dec. 13 (5th Dist. 1995) (facts should be alleged so that "discovery rule" is satisfied on face of complaint).

An interesting issue arises when the evidence indicates that the attorney is one of several proximate causes of the plaintiff's alleged loss: Is the plaintiff required to pursue recovery against the other wrongdoers before bringing an action against the former attorney? Although no Illinois state court decision has directly addressed this question, the federal district court discussed it in *Alper v. Altheimer & Gray*, 65 F.Supp.2d 778 (N.D.Ill. 1999). In that case, when the plaintiffs advanced alternative theories of causation (fraud by a purchaser of the plaintiffs' business and one of the plaintiffs' former employees as well as negligence by the plaintiffs' former counsel), the former counsel argued that the plaintiffs must first attempt to recover from other potentially liable parties before pursuing a negligence action against their attorneys. The trial court rejected that argument, holding:

**Defendants have not produced, and the court has not uncovered, a case in which 1) the underlying transaction or proceeding for which the attorneys were retained is complete, 2) the plaintiff has adduced evidence of a breach of duty and damages, 3) the plaintiff has at some point advanced more than one theory of causation, and 4) the court has held that the plaintiff cannot recover from the attorneys for negligence until they have exhausted other potentially viable causes of action to recover their loss. The court does not perceive a sound policy rationale for forcing a plaintiff to sue all other potentially responsible defendants before suing their attorneys; indeed, in oral argument Defendants' counsel allowed that such a hard-and-fast rule would be "nutty." 65 F.Supp.2d at 787.**

From the plaintiff's perspective, this result is consistent with the jury instruction defining proximate cause.

**When I use the expression “proximate cause,” I mean [that] [a] [any] cause which, in natural or probable sequence, produced the injury complained of. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time which, in combination with it, causes the injury.]** Illinois Pattern Jury Instructions — Civil No. 15.01 (2006) (I.P.I. — Civil).

In contrast, when a client's cause of action remains viable despite his or her lawyer's malpractice and after the lawyer's discharge, the client cannot establish a recoverable injury. Yet, additional legal fees above and beyond those he or she would have incurred without the malpractice could constitute damages. *See Nettleton v. Stogsdill*, 387 Ill.App.3d 743, 899 N.E.2d 1252, 326 Ill.Dec. 601 (2d Dist. 2009). *But see Weisman v. Schiller, Ducanto & Fleck, Ltd.*, 368 Ill.App.3d 41, 856 N.E.2d 1124, 306 Ill.Dec. 29 (1st Dist. 2006) (plaintiff, who claimed she was forced to settle her viable divorce claims for lesser amount after her first lawyer's discharge, was allowed to proceed to jury trial, but was not entitled to non-pattern instruction on “viability” of her divorce claims).

In drafting the complaint, the attorney should also consider the consequences of accusing the defendant of fraud (or similar claims of intentional wrongdoing) and the impact it may have on the defendant attorney's insurance coverage. Most insurers may decline coverage based on allegations of fraud. Given the limitation Illinois law places on the ability of a client to recover punitive damages against an attorney (735 ILCS 5/2-1115), allegations of fraud may not lead to increased damages against the defendant and may actually reduce the pool of resources available either to settle a claim or to pay a judgment if they lead to the denial of coverage.

It should be noted that in a legal malpractice action against a criminal defense attorney that allegedly resulted in a conviction, the plaintiff must also prove, in addition to the normal elements of a malpractice claim, that he or she was innocent of the crime for which the defendant provided representation. *See Kramer v. Dirksen*, 296 Ill.App.3d 819, 695 N.E.2d 1288, 231 Ill.Dec. 169 (1st Dist. 1998); *Moore v. Owens*, 298 Ill.App.3d 672, 698 N.E.2d 707, 232 Ill.Dec. 616 (5th Dist. 1998).

If the reviewing attorney believes that the facts evidence conduct by the client's lawyer that violates RPC 8.4(a)(3) (“commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer”) or RPC 8.4(a)(4) (“engage in conduct involving dishonesty, fraud, deceit or misrepresentation”), the attorney may have a duty to report that conduct to the Illinois Attorney Registration and Disciplinary Commission pursuant to RPC 8.3, Reporting Professional Misconduct, even if that conduct is set forth in a complaint filed with the court. *Skolnick v. Altheimer & Gray*, 303 Ill.App.3d 27, 708 N.E.2d 1177, 237 Ill.Dec. 137 (1st Dist. 1999), *aff'd in part, rev'd in part*, 191 Ill.2d 214 (2000).

Finally, the most frequent mistake in the plaintiff's complaint is the lack of facts pled demonstrating the meritorious case within a case. Care should be taken as this will possibly avoid

one or more dismissal motions that will be costly and will cause certain delay. If the elements of the underlying case cannot be set forth in prima facie fashion, then perhaps the case should not be filed.

## **2. Responding to the Complaint — Defendant’s Perspective (Motion Practice)**

### *a. [6.9] Motion for Extension of Time To Answer or Otherwise Plead*

Supreme Court Rule 183 allows the court, for good cause, to extend the time for filing any pleading before or after the expiration of time. Because a legal malpractice case involves the pleading of two cases, the legal malpractice case and the underlying case within the case, it is not feasible for the defendant to answer all of the allegations without reviewing an underlying case file or obtaining and reviewing documents, possibly in the former client’s possession. Also, S.Ct. Rule 137 requires “reasonable inquiry” into the facts and law. It is generally accepted that some additional time may be required prior to the preparation and filing of an answer. Therefore, consideration should be given to conducting the necessary due diligence inquiry prior to committing to a responsive pleading.

### *b. [6.10] Motions To Dismiss Pursuant to 735 ILCS 5/2-615 — Defects*

Legal malpractice cases involve legal questions, rights, and remedies flowing from an underlying representation that must be clarified and understood. Threshold legal questions frequently require adjudication as matters of law before the legal malpractice case may proceed. Due to the expense and labor of prolonged litigation, it is desirable to sort out key legal issues at the onset by a motion to dismiss. This chapter does not touch on every possible ground for dismissal but does discuss some of the common ones.

#### (1) [6.11] Failure to state a claim

Code of Civil Procedure §2-615 provides that objections to pleadings shall be raised by motion and the motion shall point out specifically the defects complained of. 735 ILCS 5/2-615. A motion under §2-615 to dismiss attacks the legal sufficiency of the complaint for failing to set forth the legally recognized claim as the basis for recovery or for failing to plead facts that bring the claim within the legally recognized cause of action alleged. *See, e.g., Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill.App.3d 784, 767 N.E.2d 470, 263 Ill.Dec. 19 (1st Dist. 2002). Motions to dismiss or strike allegations in the legal malpractice case may arise from the plaintiff’s failure to plead any single element of the legal malpractice case, namely, the attorney-client relationship, duty, breach of duty, and damages proximately caused by the lawyer’s actions or failure to take action.

Even when a plaintiff has sufficiently pled an attorney-client relationship and the breach of the duties arising therefrom, to state a good and sufficient cause of action for legal malpractice in either tort or contract, the plaintiff must plead facts establishing that the breach was the proximate cause of the alleged damages. *Majumdar v. Lurie*, 274 Ill.App.3d 267, 653 N.E.2d 915, 210 Ill.Dec. 720 (1st Dist. 1995). Proximate causation is the most fertile area for motion practice in legal malpractice litigation because it flows from the plaintiff’s very strict requirement of

pleading facts showing a valid and enforceable underlying case within a case—in other words, that the plaintiff would have won but for his or her lawyer’s negligence. Damages are never presumed in legal malpractice, and the plaintiff bears the burden of pleading that the loss of the underlying case was a proximate result of the attorney’s claimed negligence. *Ignarski v. Norbut*, 271 Ill.App.3d 522, 648 N.E.2d 285, 207 Ill.Dec. 829 (1st Dist. 1995). Thus, the case-within-a-case principle requires the plaintiff to establish in the pleading how he or she would have been successful in his or her underlying lawsuit. In *Claire Associates v. Pontikes*, 151 Ill.App.3d 116, 502 N.E.2d 1186, 1190, 104 Ill.Dec. 526 (1st Dist. 1986), the court noted:

**Legal-malpractice complaints are by their nature lawsuits dependent upon predicate lawsuits. In the terms chosen by the litigants herein, a legal-malpractice claim is a “case within a case.” This is because of the damages element of the action; no malpractice exists unless counsel’s negligence has resulted in the loss of an underlying cause of action or the loss of a meritorious defense if the attorney was defending in the underlying suit.**

While not entirely clear, it is expected that the “but for” proximate cause requirement is equally applicable to transactional malpractice. *See, e.g., Serafin v. Seith*, 284 Ill.App.3d 577, 672 N.E.2d 302, 219 Ill.Dec. 794 (1st Dist. 1996), *appeal denied*, 172 Ill.2d 568 (1st Dist. 1997); *Viner v. Sweet*, 30 Cal.4th 1232, 70 P.3d 1046 (2003) (plaintiff in transactional malpractice still required to show that but for alleged malpractice, it would have obtained more favorable result in transaction at issue).

Quite often, a winnable motion to dismiss can be brought when the plaintiff is equivocal in establishing the “but for” element in the complaint. For example:

**Due to the defendant’s failure to Bates stamp the document production, the plaintiff was able to succeed in objections at trial and in motions in limine, and my ability to prove my defense was negatively impacted.**

The plaintiff cannot complain that an attorney should have acted differently unless the allegation demonstrates that the plaintiff would have prevailed (not “might” have prevailed). Even if an attorney is obviously negligent, for example, by allowing a statute of limitations to expire, “it is incumbent upon the client to prove that the negligence was the proximate cause of his loss.” *Cook v. Gould*, 109 Ill.App.3d 311, 440 N.E.2d 448, 450, 64 Ill.Dec. 896 (3d Dist. 1982). *See also Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812 (7th Cir. 1994) (it is not malpractice to fail to make motion that has little chance of being granted); *Sharpenter v. Lynch*, 233 Ill.App.3d 319, 599 N.E.2d 464, 174 Ill.Dec. 680 (2d Dist. 1992) (plaintiff could not as matter of law establish she would have prevailed in underlying action); *Roberts v. Heilgeist*, 124 Ill.App.3d 1082, 465 N.E.2d 658, 661, 80 Ill.Dec. 546 (2d Dist. 1984) (question of duty is one of law for court to decide, and attorney owes no duty to pursue “almost certainly fruitless litigation”); *Lopez v. Clifford Law Offices, P.C.*, 362 Ill.App.3d 969, 841 N.E.2d 465, 299 Ill.Dec. 53 (1st Dist. 2005) (it is prima facie negligence for attorney to misinform client on statute of limitations, and former client’s consultation with new attorney did not constitute superseding cause that relieved defendant of liability in legal malpractice action.)

The plaintiff, therefore, should plead the facts giving rise to the underlying cause of action. Thus, if the legal malpractice allegation stems from the lawyer's failure to pursue an underlying slip-and-fall personal injury action, the complaint must contain the factual underpinnings of a successful slip-and-fall action. The failure to establish the elements of the underlying claim, whether in the litigation, transactional, or other setting, is grounds for dismissal of the legal malpractice case. At the same time, the plaintiff may, in response to a motion to dismiss, want to remind the court that, under Illinois law, "the plaintiff is not required to set out evidence; only the ultimate facts to be proved should be alleged, not the evidentiary facts tending to prove such ultimate facts." *Chandler v. Illinois Central R.R.*, 207 Ill.2d 331, 798 N.E.2d 724, 733, 278 Ill.Dec. 340 (2003).

The pleading requirement for an action for aiding and abetting by a lawyer differs from the requirement for traditional malpractice cases. In Illinois, to state a claim for aiding and abetting, a plaintiff must allege that (a) the party whom the defendant aided performed a wrongful act that caused an injury; (b) the defendant was regularly aware of his or her role when providing the assistance; and (c) the defendant knowingly and substantially assisted the principal violation. *Thornwood, Inc. v. Jenner & Block*, 344 Ill.App.3d 15, 799 N.E.2d 756, 767, 278 Ill.Dec. 891 (1st Dist. 2003), citing *Wolf v. Liberis*, 153 Ill.App.3d 488, 505 N.E.2d 1202, 1208, 106 Ill.Dec. 411 (1st Dist. 1987).

A motion to dismiss may also be based on the failure to allege legally cognizable damages. Thus, it is considered legally insufficient merely to criticize the lawyer's conduct unless the pleading demonstrates that the defendant's alleged acts or omissions proximately caused the result in the underlying case. In *Land v. Greenwood*, 133 Ill.App.3d 537, 478 N.E.2d 1203, 88 Ill.Dec. 595 (4th Dist. 1985), a lawyer was sued for failing to serve certain defendants with process within the statute of limitations. However, the successor counsel pursued the legal malpractice case rather than attempt to salvage a potentially viable underlying claim against at least one potentially viable defendant. Dismissal was upheld because the case was deemed viable when successor counsel inherited it. *Land* was cited with approval in *Nettleton v. Stogsdill*, 387 Ill.App.3d 743, 899 N.E.2d 1252, 326 Ill.Dec. 601 (2d Dist. 2009). The successor counsel was said to have a duty to preserve the client's viable cause of action and may have the duty to "rescue" prior counsel. *Id.* See also *Kling v. Landry*, 292 Ill.App.3d 329, 686 N.E.2d 33, 226 Ill.Dec. 684 (2d Dist. 1997), *appeal denied*, 176 Ill.2d 575 (1998) (lawyer's sexual relationship with client not sufficient to state cause of action for malpractice, absent adverse effect on legal representation).

A client's actual damages can be sufficiently alleged and established when the client is subjected to an underlying adverse judgment caused by the negligence of his or her lawyer even though the complaint did not allege that the client had paid any portion of the judgment. *Fox v. Seiden*, 382 Ill.App.3d 288, 887 N.E.2d 736, 320 Ill.Dec. 592 (1st Dist. 2008) (bankruptcy trustee sued lawyer engaged to defend action resulting in judgment in excess of \$1 million; allegation of judgment alone was sufficient allegation of actual damages to overcome motion to dismiss).

(2) [6.12] Duplicative counts or causes of action

While legal malpractice cases may be pled in the alternative between tort and contract (*Kerschmer v. Weiss & Co.*, 282 Ill.App.3d 497, 667 N.E.2d 1351, 217 Ill.Dec. 775 (1st Dist.), *appeal denied*, 168 Ill.2d 594 (1996)), sometimes it may be stated that the contract claim is duplicative of the tort claim if the facts, legal duty, and damages are identical. Therefore, the courts have allowed dismissal of the contract claim when it is duplicative of the tort claim. *Majumdar v. Lurie*, 274 Ill.App.3d 267, 653 N.E.2d 915, 210 Ill.Dec. 720 (1st Dist.), *appeal denied*, 164 Ill.2d 566 (1995); *Nettleton v. Stogsdill*, 387 Ill.App.3d 743, 899 N.E.2d 1252, 326 Ill.Dec. 601 (2d Dist. 2009). Similarly, a breach of fiduciary claim may be indistinguishable from a negligence claim if it is premised on the duty of care as opposed to a clearly higher fiduciary duty of loyalty, integrity, accountability, or honesty. If the legal malpractice complaint essentially stands on the implied duty to adhere to acceptable standards of care, then variance of the same claim styled as contract or breach of fiduciary duty may be deemed duplicative and subject to dismissal. *Calhoun v. Rane*, 234 Ill.App.3d 90, 599 N.E.2d 1318, 175 Ill.Dec. 304 (1st Dist. 1992). *Nettleton, supra*.

(3) [6.13] Striking prejudicial matters

In responding to the complaint, consideration also should be given to potentially prejudicial pleadings and, in particular, pleadings attacking the fitness and character of the lawyer and implicating criminal conduct or disciplinary rule violations. As to the latter, while the Rules of Professional Conduct may be relevant evidence of the standards of care (*Owens v. McDermott, Will & Emery*, 316 Ill.App.3d 340, 736 N.E.2d 145, 249 Ill.Dec. 303 (1st Dist. 2000); *Nagy v. Beckley*, 218 Ill.App.3d 875, 578 N.E.2d 1134, 161 Ill.Dec. 488 (1st Dist. 1991)), they do not establish a separate cause of action in tort. *Levine v. Kling*, 922 F.Supp. 127 (N.D.Ill. 1996), *aff'd*, 123 F.3d 580 (7th Cir. 1997). Also, the pleading of rules violations solely to prejudice the defendant or, worse, to threaten disciplinary consequences, may be deemed improper. See RPC 8.4 (Misconduct) which states:

**It is professional misconduct for a lawyer to:**

\* \* \*

**(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.** [Emphasis added.]

(4) [6.14] Dismissal for lack of viable damage theory

Dismissal of certain damage theories may be appropriate and may be raised by motion. The damages element of a legal malpractice claim may not be based on guess, conjecture, or speculation. *Glass v. Pitler*, 276 Ill.App.3d 344, 657 N.E.2d 1075, 212 Ill.Dec. 730 (1st Dist. 1995). An example of a “speculative” damage theory that would result in the dismissal of a complaint is an allegation that the client’s case suffered a palpable loss of value because an attorney brought the case in one jurisdiction as opposed to another. In *Transcraft, Inc. v. Galvin*,

*Stalmack, Kirschner & Clark*, 39 F.3d 812, 815 (7th Cir. 1994), the Seventh Circuit held that the allegation that the underlying case venue should have been changed from Indiana to Illinois was “a trivial theory of legal malpractice, and should not have been allowed to go to the jury.” A client likewise cannot maintain a legal malpractice action against its attorney who mishandled the client’s request for a jury trial because the lost benefit of a jury trial versus trial by judge is too speculative to measure. *Jones Motor Co. v. Holtkamp, Liese, Beckemeier & Childress, P.C.*, 197 F.3d 1190 (7th Cir. 1999). In *Jones Motor Co.*, while the lost opportunity to have the case heard by a fact finder that the client believed was more sympathetic to its position was possibly worth something, the client did not establish with a reasonable certainty what damages it suffered when its attorney failed to protect this right.

The Illinois Supreme Court has held that a mere change in the identity of a judgment creditor, without more, entails no quantifiable damages for the purposes of a legal malpractice claim. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 837 N.E.2d 99, 297 Ill.Dec. 319 (2005). In *Northern Illinois*, the court affirmed the circuit courts grant of the defendant’s motion for summary judgment, holding that the plaintiff had no grounds for claiming that the defendant attorneys’ failure to challenge the timeliness of a third-party indemnity action had adverse consequences for the plaintiff. 837 N.E.2d at 111. Rather, the plaintiff’s position would have remained virtually unchanged, with the only difference being the party to whom the plaintiff owed any damages. *Id.*

When legal precedent has established a defense based on speculative or incalculable damages, this may be appropriately raised by a motion to dismiss and decided as a matter of law.

*c. [6.15] Motions To Dismiss Pursuant to 735 ILCS 5/2-619 — Affirmative Matters*

Under §2-619 of the Code of Civil Procedure, the defendant is entitled to involuntary dismissal based on certain defects or defenses. If the grounds do not appear on the face of the pleading, the motion must be supported by affidavit. When a party moving to dismiss pursuant to §2-619 presents affirmative matter containing well pleaded facts, and the opposing party does not file supporting documentation to counter the facts, the moving party’s affirmative matter is accepted as true, despite any contrary assertions in the opposing party’s pleading. *Webb v. Damisch*, 362 Ill.App.3d 1032, 842 N.E.2d 140, 299 Ill.Dec. 401 (1st Dist. 2005).

Legal malpractice actions provide many opportunities for motions to dismiss based on affirmative matters and matters outside the complaint. A number of these are in §§6.16 – 6.24 discussed below.

(1<sup>1</sup>) [6.15A] Jurisdiction

**[This section was added by the 2010 supplement.]**

In the modern reality of multi-jurisdictional practice, lawyers from foreign jurisdictions will be implicated in Illinois malpractice claims. Personal jurisdiction issues will be ripe for early motion practice. One appellate court held that Illinois courts lacked personal jurisdiction over a

Texas transactional lawyer when affidavits established he never came to Illinois, did not negotiate the loan agreements whereby funds were transferred from Illinois to Texas, and did not engage in any purposeful conduct directed at Illinois. *Knaus v. Guidry*, 389 Ill.App.3d 804, 906 N.E.2d 644, 329 Ill.Dec. 448 (1st Dist. 2009).

With respect to legal malpractice claims in which the underlying issue involves a patent, attention should be given at an early stage to the trial court's subject matter jurisdiction if the action has been commenced in state court. *See Premier Networks, Inc. v. Stadheim & Grear, Ltd.*, 395 Ill.App.3d 629, 918 N.E.2d 117, 335 Ill.Dec. 304 (1st Dist. 2009) (trial court lacked subject matter jurisdiction over patent owner's legal malpractice claim when malpractice issues were inextricably bound to determinations of substantive issues of patent law, over which federal courts have exclusive jurisdiction).

(1) [6.16] Statute of limitations

Section 13-214.3 of the Code of Civil Procedure provides that an action for damages based on tort, contract, or otherwise against an attorney arising out of an act or omission in the performance of professional services or against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced within two years from the time the person bringing the action "knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3. The provision also provides a statute of repose as follows:

**(c) except as provided in subsection (d), an action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred. *Id.***

The statute of limitations became effective to all causes of action accruing on or after the effective date of January 1, 1991.

Illinois courts have consistently held that legal malpractice actions accrue under the statute at the time the plaintiff knew or reasonably should have known of the injury for which damages are sought and that they were wrongfully caused by the attorney. *See Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill.App.3d 349, 703 N.E.2d 473, 234 Ill.Dec. 612 (1st Dist. 1998); *Goodman v. Harbor Market, Ltd.*, 278 Ill.App.3d 684, 663 N.E.2d 13, 215 Ill.Dec. 263 (1st Dist. 1995). In litigation malpractice, the accrual is typically the date of the final adverse judgment, settlement, or dismissal of the underlying case. *See Warnock v. Karm Winand & Patterson*, 376 Ill.App.3d 364, 876 N.E.2d 8, 315 Ill.Dec. 8 (1st Dist 2007).

In the transactional setting, the date on which the act or omission occurred is generally equated to the date that the allegedly defective documents are delivered to the client. *Fricka v. Bauer*, 309 Ill.App.3d 82, 722 N.E.2d 718, 242 Ill.Dec. 934 (1st Dist. 1999). However, even in the transactional setting, the limitation period may be tolled. In *Tuchowski v. Rochford*, 368 Ill.App.3d 441, 857 N.E.2d 829, 830, 306 Ill.Dec. 430 (1st Dist. 2006), the plaintiff's complaint alleged that following a real estate transaction, the plaintiff did not discover the sale of an

additional lot until three years after the transaction. The court held that the plaintiff's allegations that she relied on the attorney, and did not discover the sale of the third lot until three years after the closing, were sufficient to support a claim that the limitations period was tolled under the discovery rule. 857 N.E.2d at 833 – 834.

The limitations statute also provides a special limitations for causes in which the injury “does not occur until the death of a person for whom the professional services were rendered.” 735 ILCS 5/13-214.3(a). In such cases, the action

**may be commenced within 2 years after the date of the person's death unless letters of office are issued or the person's will is admitted to probate within that 2 year period, in which case the action must be commenced within the time for filing claims against the estate or a petition contesting the validity of a will of the deceased person, whichever is later, as provided in the Probate Act of 1975. 735 ILCS 5/13-214.3(d).**

A typical example is a legal malpractice allegation for a faulty drafting of a will. The death of the person for whom the services were rendered, the decedent, triggers the limitations. In *Petersen v. Wallach*, 198 Ill.2d 439, 764 N.E.2d 19, 261 Ill.Dec. 728 (2002), the Illinois Supreme Court clarified whether this provision applying to acts occurring due to the death of a person would apply to all testamentary instruments.

The *Petersen* court held that the exception to the two-year statute of limitations for attorney malpractice actions applies to cases when the injury caused by the legal malpractice does not occur until the death of the client (*i.e.*, the person for whom the attorney rendered professional legal services), regardless of the manner used to distribute the client's assets after death. The Supreme Court affirmed the appellate court's reversal of the trial court's dismissal. The Supreme Court cited with approval the appellate court's statement:

**The primary inquiry in determining whether section 13-214.3(d) is applicable is whether the injury caused by the act or omission occurred upon the death of the person for whom the services were rendered, not the manner in which the assets were distributed. 764 N.E.2d at 22.**

In *Jaason v. Sullivan*, 389 Ill.App.3d 376, 906 N.E.2d 125, 329 Ill.Dec. 280 (1st Dist. 2009), the appellate court calculated the legal malpractice statute of limitations by reference to the Probate Act's deadlines for filing claims against the client's estate. It is clear from this opinion that pinpointing the probate limitations can be very tricky, depending on many factors. *See also Wackrow v. Niemi*, 231 Ill.2d 418, 899 N.E.2d 273, 326 Ill.Dec. 56 (2008) (Illinois Supreme Court reiteration of validity and exclusive effect of §13-214.3(d), applying when alleged injury does not occur until death of person for whom professional services were rendered.)

(2) [6.17] Repose

The statute of repose may bar a legal malpractice claim even before it accrues. In *Meyers v. Underwood*, 316 Ill.App.3d 970, 738 N.E.2d 118, 129, 250 Ill.Dec. 154 (1st Dist. 2000), the appellate court recognized that “statutes of repose simply presume that causes of action may be barred before they accrue.” The *Meyers* court continued,

**the period of repose gives effect to a policy different from that advanced by a period of limitations; the purpose of the statute of repose is to impose a cap on the applicability of the discovery rule so that the outer limit terminates the possibility of liability after a definite period of time, regardless of a potential plaintiff’s lack of knowledge of his cause of action.** 738 N.E.2d at 129 – 130, quoting *Serafin v. Seith*, 284 Ill.App.3d 577, 672 N.E.2d 302, 310, 219 Ill.Dec. 794 (1st Dist. 1996).

See also *Sorenson v. Law Offices of Theodore Poehlmann*, 327 Ill.App.3d 706, 764 N.E.2d 1227, 262 Ill.Dec. 110 (2d Dist. 2002).

In *Sorenson*, the appellate court also rejected the “continuous representation” rule as a basis to avoid the application of the statute of repose in a legal malpractice action. The plaintiff had argued that a subsequent appeal by the lawyer made the attorney-client relationship ongoing. The *Sorenson* court rejected the plaintiff’s arguments, stating:

**As to the first point — that the parties contemplated an ongoing attorney-client relationship — we reiterate that the statute of repose runs from the time of the acts or omissions alleged to have caused the injury; the fact that the attorney-client relationship endures thereafter does not effect the repose period.** 764 N.E.2d at 1231.

See also *Witt v. Jones & Jones Law Offices, P.C.*, 269 Ill.App.3d 540, 646 N.E.2d 23, 206 Ill.Dec. 891 (4th Dist. 1995) (rejecting “continuous representation” rule). Compare *Zelenka v. Krone*, 294 Ill.App.3d 248, 689 N.E.2d 1154, 228 Ill.Dec. 733 (3d Dist. 1997), which held that the exception in Code of Civil Procedure §13-214.3(d) would not apply to a “living trust” even though injury occurred at death. However, *Zelenka* was overruled by the Supreme Court’s decision in *Petersen v. Wallach*, 198 Ill.2d 439, 764 N.E.2d 19, 261 Ill.Dec. 728 (2002).

In *Wackrow v. Niemi*, 231 Ill.2d 418, 899 N.E.2d 273, 326 Ill.Dec. 56 (2008), the Illinois Supreme Court clarified *Petersen* and held that the six-year repose period does *not* apply to causes of action falling under §13-214.3(d) when the injury does not occur until the death of the person for whom professional services were rendered. In *Wackrow*, the client had six months following the date the will was admitted to probate to file her complaint for legal malpractice.

Also, under the statute of limitations, if the person entitled to bring the action is under the age of majority or under other legal disability at the time the cause of action accrues, “the period of limitations shall not begin to run until majority is attained or the disability is removed.” 735 ILCS 5/13-214.3(e). In *Deluna v. Burciaga*, 223 Ill.2d 49, 857 N.E.2d 229, 239, 306 Ill.Dec. 136 (2006), the Illinois Supreme Court, relying on 735 ILCS 5/13-214.3(e), held that the statute of repose is tolled during a plaintiff’s minority.

The *Deluna* decision also addressed the issue of fraudulent concealment. The court held that when an attorney fraudulently conceals a cause of action for legal malpractice, such concealment eliminates any protection afforded an attorney by the statute of repose. 857 N.E.2d at 243. Relying on 735 ILCS 5/13-215, the court reasoned that “it is inconceivable that the legislature would have intended to limit physicians’ reliance upon the medical malpractice statute of repose, when physicians have fraudulently concealed a cause of action from their patients, but to allow attorneys to benefit from the legal malpractice statute of repose, where they have done the same to their clients.” 857 N.E.2d at 244. Section 13-215, when applicable, provides a plaintiff with an exception to the statute of repose contained in §13-214.3(c). *Id.* See also *Mauer v. Rubin*, No. 1-08-3211, 2010 WL 1194826 (1st Dist. Mar. 26, 2010) (no equitable tolling or fraudulent concealment when claimant discovers fraudulent concealment, or should have discovered it through ordinary diligence, and reasonable time remains in repose period).

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#### PRACTICE POINTER

- ✓ Code of Civil Procedure §13-214.3(d), applying to damages occurring at death of the person for which services were rendered, was amended effective January 1, 1993. However, the amendment was part of the tort reform bill, which was overturned in *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057, 228 Ill.Dec. 636 (1997). Accordingly, the amendment became invalid, and, therefore, the original text of §13-214.3(d) as outlined in §6.16 above remains in effect.
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While a statute of limitations and repose defense may properly be raised by a Code of Civil Procedure §2-619 motion to dismiss, it is often pled as an affirmative matter and later raised by way of a summary judgment motion pursuant to Code of Civil Procedure §2-1005. Very often, the accrual of the legal malpractice action for purposes of asserting the statute of limitations depends on interpretation of when the client knew or reasonably should have known of his or her injury and that it was caused by the attorney’s conduct. Thus, there may be too many factual disputes to resolve this issue on a motion to dismiss.

A claim of equitable estoppel may be asserted in an effort to defeat a statute of limitations or statute of repose defense. An Illinois client was not barred from asserting that an attorney was equitably estopped from raising the defenses of statutes of limitations and repose in a legal malpractice action when the attorney neglected to advise the client that her workers’ compensation claim had been dismissed and the ascertainment of the status of her workers’ compensation claim was not as simple as a check of courthouse records. *Hester v. Diaz*, 346 Ill.App.3d 550, 805 N.E.2d 255, 281 Ill.Dec. 887 (5th Dist. 2004). *But see Mauer, supra* (no equitable tolling if ample time remains in repose period at time of discovery of defendant’s conduct).

However, a review of caselaw from other states reveals that courts are divided over whether a plaintiff can invoke the doctrine of equitable estoppel to defeat a statute of repose defense. *Compare Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541, 548 (1994) (allowing equitable estoppel to be asserted against medical malpractice statute of repose), *Esener v. Kinsey*, 240 Ga.App. 21, 522 S.E.2d 522, 524 (1999) (allowing equitable estoppel to be used to bar statute of

repose defense in legal malpractice case), *Hoffner v. Johnson*, 660 N.W.2d 909, 917 (N.D. 2003), and *One North McDowell Association of Unit Owners, Inc. v. McDowell Development Co.*, 98 N.C.App. 125, 389 S.E.2d 834, 836 (1990), with *Florida Department of Health & Rehabilitative Services v. S.A.P.*, 835 So.2d 1091, 1100 (Fla. 2002) (stating that statute of repose “forecloses all forms of equitable relief”), *Joyce v. Garnaas*, 295 Mont. 198, 983 P.2d 369, 374 (1999) (holding that equitable estoppel can be used in medical malpractice cases, but not in legal malpractice cases, to bar statute of repose defense), and *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (holding equitable estoppel could not be used to bar federal statute of repose defense because “very purpose [of a statute of repose] is to set an outer limit unaffected by what the plaintiff knows”).

### (3) [6.18] Prematurity

Even if less than two years has passed since the attorney’s alleged wrongful conduct, an action may be deemed “premature” because the fact of any damage actually occurring is undecided, usually due to pendency of the underlying litigation. *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill.App.3d 349, 703 N.E.2d 473, 234 Ill.Dec. 612 (1st Dist. 1998); *Bartholomew v. Crockett*, 131 Ill.App.3d 456, 475 N.E.2d 1035, 86 Ill.Dec. 656 (1st Dist. 1985); *Schulte v. Burch*, 151 Ill.App.3d 332, 502 N.E.2d 856, 104 Ill.Dec. 359 (3d Dist. 1990). In such situations, the case is deemed premature because the underlying litigation giving rise to the malpractice case was, in theory, still viable or not fully decided. Typically, the remedy for prematurity is a stay of the action or, in the alternative, a dismissal without prejudice to refile. The granting of a dismissal under the prematurity doctrine is rarely with prejudice as the doctrine assumes that damages may ripen in the future, depending on the course of the underlying litigation.

### (4) [6.19] Res judicata — collateral estoppel — judicial estoppel

The related but distinct legal defenses of res judicata and collateral estoppel may be raised by motion on the basis that the underlying case or controversy has been decided on the merits or on the basis that the prior litigation position or ruling or judgment operates as a bar or estoppel. In *Thomas v. Sklodowski*, 303 Ill.App.3d 1028, 709 N.E.2d 656, 237 Ill.Dec. 401 (1st Dist. 1999), the client brought a legal malpractice action claiming his attorney’s failure to provide him with notice of his withdrawal in an underlying federal civil rights case led to a default judgment against him. The federal court had determined that the withdrawing lawyer had made “every effort” to provide notice to his client and granted the motion to withdraw. In the underlying federal withdrawal, the plaintiff sought to vacate the judgment order on grounds of lack of notice. The petition was denied. The Illinois appellate court found that the prior court’s order was not subject to collateral attack and that any dispute the plaintiff had with the court’s order was properly the subject of an appeal to the Seventh Circuit Court of Appeals rather than a collateral legal malpractice proceeding. While that case was decided on summary judgment grounds, the defense could have been raised by a Code of Civil Procedure §2-619 motion to dismiss, assuming the record was complete.

A motion based on res judicata that is supported by the underlying record of proceedings is proper under §2-619. See *Goran v. Gliberman*, 276 Ill.App.3d 590, 659 N.E.2d 56, 213 Ill.Dec.

426 (1st Dist. 1995); *Storm & Associates, Ltd. v. Cuculich*, 298 Ill.App.3d 1040, 700 N.E.2d 202, 233 Ill.Dec. 101 (1st Dist. 1998) (judge can take judicial notice of underlying record of case within case); *Sarno v. Akkeron*, 292 Ill.App.3d 80, 684 N.E.2d 964, 225 Ill.Dec. 973 (1st Dist. 1997) (defense of collateral estoppel was raised by defendant attorney on motion pursuant to 735 ILCS 5/2-615). In *Sarno*, the appellate court found that factual issues existed concerning whether the client had a “full and fair opportunity. . . to litigate” the issue in the underlying bankruptcy court. 684 N.E.2d at 969. While the collateral estoppel defense was viable, it was fact-dependent and inappropriate for a §2-615 motion to dismiss. *See also Nagy v. Beckley*, 218 Ill.App.3d 875, 578 N.E.2d 1134, 161 Ill.Dec. 488 (1st Dist. 1991) (collateral estoppel raised on §2-619 motion to dismiss barred former client’s legal malpractice claim against attorneys for negligently failing to raise defense of unconscionability in earlier actions when defense was raised and rejected by trial and appellate courts based largely on client’s testimony, and client failed to allege any specific facts to support conclusory allegation that result of litigation would have been different if defense had been asserted earlier); *Todd v. Katz*, 187 Ill.App.3d 670, 543 N.E.2d 1066, 135 Ill.Dec. 498 (2d Dist. 1989) (collateral estoppel barred client’s legal malpractice claim alleging attorney’s failure to attach exhibit to marital settlement agreement caused him to lose insurance benefits when court previously had decided in separate action that claimants had received all insurance to which they were entitled).

While a court order granting an involuntary dismissal with prejudice is not a final judgment on the merits for purposes of res judicata, the same is not true for a voluntary dismissal. A state court order voluntarily dismissing a suit with prejudice is considered a final judgment on the merits for purposes of the application of the doctrine of res judicata. *Mann v. Rowland*, 342 Ill.App.3d 827, 795 N.E.2d 924, 277 Ill.Dec. 256 (1st Dist. 2003).

There is no prevailing definition of “privity” for purposes of applying the doctrine of res judicata. However, an associate, working at a firm but not named in the original hearing, may be in privity with that firm in its original fee agreement for purposes of the subsequent litigation. *Purmal v. Robert N. Wadington & Associates*, 354 Ill.App.3d 715, 820 N.E.2d 86, 289 Ill.Dec. 578 (1st Dist. 2004) (holding that when associate would have shared in any fees recovered on behalf of firm, his interests in attorneys’ fees would have been affected by judgment as if he were party, his interest in prior litigation arose from his connection to law firm as employee of that firm, he provided information and affidavit concerning his representation of plaintiff, and he worked as employee and associate of firm, he was in privity with firm for purposes of application of res judicata).

A denial of a defendant’s motion for leave to file a third-party claim operates to preclude further pursuit of the contribution claim. A contribution action may not be brought in a separate proceeding if the party first attempted to bring the claim in the original proceedings in a separate jurisdiction and was denied leave by that court to file the same contribution claim. *Harshman v. DePhillips*, 218 Ill.2d 482, 844 N.E.2d 941, 300 Ill.Dec. 498 (2006).

A judicial estoppel defense, asserting that the clients’ underlying testimony is “totally” inconsistent with the malpractice claim, may be brought by motion with a supporting record of the underlying proceedings. *See Larson v. O’Donnell*, 361 Ill.App.3d 388, 836 N.E.2d 863, 297 Ill.Dec. 132 (1st Dist. 2005). A frequent example is a divorce prove-up during which the client

unequivocally acknowledges her informed consent to waive discovery and to settle her divorce, but later sues her lawyer for failure to advise her as to her rights to such valuation evidence. One appellate court reversed a dismissal granted on judicial estoppel grounds when the client filed an affidavit claiming her prove-up testimony was the product of misrepresentation as to her rights by her lawyer, even though she testified that she understood and agreed to the terms of her marital settlement agreement. *Wolfe v. Wolf*, 375 Ill.App.3d 702, 874 N.E.2d 582, 314 Ill.Dec. 486 (1st Dist. 2007), citing *Mungo v. Taylor*, 355 F.3d 969 (7th Cir. 2004).

(5) [6.20] Unclean hands or actions based on illegal or immoral conduct

Clients have pursued legal malpractice remedies against attorneys when the client has placed himself or herself in a questionable situation of illegality, immorality, or unethical conduct. Several decisions in cases of this type have discussed the question of the court's jurisdiction and have held that the court was required to leave the parties where it finds them and provide no remedy.

In *Makela v. Roach*, 142 Ill.App.3d 827, 492 N.E.2d 191, 96 Ill.Dec. 949 (2d Dist. 1986), a wife who retained an attorney to advise her on a plan to transfer marital assets from her husband for the purpose of defrauding the husband's legitimate creditors could not seek relief through a legal malpractice action. The court stated:

**Where a party voluntarily elects to follow advice intended to extricate herself from a questionable situation, she comes to this court with unclean hands and may not seek relief from her wrongful conduct through a legal malpractice action. . . . We pass no judgment on the advice given by defendant, as our refusal to aid [plaintiff] is a decision based on her attempt to evade the law.** [Citation omitted.] 492 N.E.2d at 194.

See also *Robins v. Lasky*, 123 Ill.App.3d 194, 462 N.E.2d 774, 78 Ill.Dec. 655 (1st Dist. 1984) (legal malpractice action dismissed in light of client bringing action with "unclean hands," seeking relief from his wrongful conduct). *Accord Mettes v. Quinn*, 89 Ill.App.3d 77, 411 N.E.2d 549, 44 Ill.Dec. 427 (3d Dist. 1980); *Buttitta v. Newell*, 176 Ill.App.3d 880, 531 N.E.2d 957, 126 Ill.Dec. 330 (1st Dist. 1988).

In *Mettes, supra*, the appellate court affirmed the dismissal of the plaintiff's legal malpractice action and stated:

**It has been the policy of the courts to refuse to aid anyone who seeks to ground his cause of action upon an illegal or immoral act or transaction. This refusal to aid derives not from the consideration of the defendant, but from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of Government.** 411 N.E.2d at 551, quoting *Bonnier v. Chicago Burlington & Quincy R.R.*, 351 Ill.App. 34, 113 N.E.2d 615, 622 (1st Dist. 1953), *rev'd*, 2 Ill.2d 606, *cert. denied*, 75 S.Ct. 53 (1954).

When the legal malpractice action appears to be grounded on any unethical, immoral, or illegal act, it is proper to advise the court of these circumstances by motion to dismiss and request

that the court deny its jurisdiction so as not to afford redress to the plaintiff. As with other motions based on factual affirmative matter, these grounds may also be more efficiently raised after discovery by summary judgment.

(6) [6.21] Defenses based on interpretation of underlying law

In many cases, the outcome of the legal malpractice depends on a legal ruling or decision that would have been obtained in the underlying case. For example, in *A.O. Smith Corp. v. Lewis, Overbeck & Furman*, 979 F.2d 546 (7th Cir. 1992), a defense attorney was accused of failing to tender a particular issues instruction in an antitrust jury trial. The client claimed not only that the case was negatively impacted, but also that the failure to tender the instruction caused an appellate waiver of defenses pertaining to the elements of the burden of proof. The federal district court agreed that it should decide the question of whether an instruction would have been tendered to the trial court in the underlying action and whether it would have sustained an appeal because they were questions of law. The Seventh Circuit disagreed with the trial judge's interpretation of the law applicable to the underlying case but agreed with the method of determining the legal question by motion to dismiss.

Under Illinois law, an attorney's performance must be evaluated by the state of the law at the time of the underlying act or omission. *DeSeno v. Becker*, 291 Ill.App.3d 421, 683 N.E.2d 159, 225 Ill.Dec. 215 (1st Dist. 1997); *Land v. Auler*, 186 Ill.App.3d 382, 542 N.E.2d 509, 134 Ill.Dec. 340 (4th Dist.), *appeal denied*, 127 Ill.2d 618 (1989) (factual determination rests with state of law during period of disputed legal representation); *O'Brien v. Noble*, 106 Ill.App.3d 126, 435 N.E.2d 554, 61 Ill.Dec. 857 (4th Dist. 1982) (attorney's conduct is viewed in context of events at time of alleged malpractice, not in light of subsequent developments). *Accord Brainerd v. Kates*, 68 Ill.App.3d 781, 386 N.E.2d 586, 25 Ill.Dec. 315 (1st Dist. 1979) (in determining whether lawyer was negligent, it is necessary to judge his conduct by factual situation existing during months when notice of appeal was actually filed); *A.O. Smith Corp.*, *supra*, 979 F.2d at 549 ("it would be manifestly unfair to expect lawyers in the midst of trial to predict how the circuit courts and Supreme Court will shape new legal doctrine").

As *Land, supra*, noted, the question of the "fact" of underlying law at the time of the circumstances of the legal malpractice may be ripe for determination by the court as a matter of law. Matters of controlling law should be considered for determination by motion to dismiss. 542 N.E.2d at 511 – 512.

(7) [6.22] Punitive damages

Under Code of Civil Procedure §2-1115, punitive damages are not recoverable in "healing art" and "legal malpractice" cases. The statute states:

**In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed. 735 ILCS 5/2-1115.**

In *Calhoun v. Rane*, 234 Ill.App.3d 90, 599 N.E.2d 1318, 175 Ill.Dec. 304 (1st Dist. 1992), the appellate court held that the prohibition of punitive damages in legal malpractice actions also applied to intentional fraud and other claims related to the provision of legal services. In *Safeway Insurance Co. v. Spinak*, 267 Ill.App.3d 513, 641 N.E.2d 834, 837, 204 Ill.Dec. 404 (1st Dist. 1984), the appellate court noted that §2-1115 “is broad enough to encompass any acts arising out of the provision of legal services.” One reported case did allow punitive damages against an attorney. *Lurz v. Panek*, 172 Ill.App.3d 915, 527 N.E.2d 663, 123 Ill.Dec. 200 (2d Dist. 1988). However, the conduct at issue in *Lurz* predated the effective date of §2-1115, August 15, 1985. Compare *Cripe v. Leiter*, 291 Ill.App.3d 155, 683 N.E.2d 516, 225 Ill.Dec. 348 (3d Dist.) (fraudulent billing by attorney was not performance of legal services and, therefore, was deemed common-law fraud, as opposed to legal malpractice as defined in §2-1115), *appeal denied*, 175 Ill.2d 525 (1997).

Another consideration of punitive damages is the question of the exclusive jurisdiction and authority of the Supreme Court to regulate the legal profession and, therefore, punish and deter conduct. The Illinois Supreme Court has maintained its exclusive jurisdiction and authority to regulate all aspects of the legal profession. *Skolnick v. Altheimer & Gray*, 191 Ill.2d 214, 730 N.E.2d 415, 246 Ill.Dec. 324 (2000) (Illinois Supreme Court has jurisdiction to regulate, punish, or deter conduct by licensed attorneys); *People ex rel. Brazen v. Finley*, 119 Ill.2d 485, 519 N.E.2d 898, 902, 116 Ill.Dec. 683 (1988) (“power to prescribe rules governing attorney conduct, and to discipline attorneys for violating those rules, rests solely in this court”); *In re Harris*, 93 Ill.2d 285, 443 N.E.2d 557, 559, 66 Ill.Dec. 631 (1982) (“disciplining of attorneys is in the nature of an original proceeding in the court”).

While as of this writing no case could be found specifically denying punitive damages on jurisdiction grounds alone, arguably, Code of Civil Procedure §2-1115 merely adopted the public policy embodied in the legal profession’s regulating scheme.

#### (8) [6.23] Judgmental immunity and other legal theories of defense

Legal malpractice claims sometimes concern the attorney’s judgment in the preparation and handling of a case. It is accepted that a lawyer cannot be held liable for every mistake in the practice of law, and liability attaches only when the attorney fails to exercise a reasonable degree of care and skill. *Spivak Schulman & Goldman v. Foremost Liquor Store, Inc.*, 124 Ill.App.3d 676, 465 N.E.2d 500, 80 Ill.Dec. 388 (1st Dist. 1984); *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812 (7th Cir. 1994). See also *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980). Mere errors in judgment do not lead to liability, even if they lead to an unfavorable result. *O’Brien & Associates, P.C. v. Tim Thompson, Inc.*, 274 Ill.App.3d 472, 653 N.E.2d 956, 210 Ill.Dec. 761 (2d Dist. 1995). The judgment defense can be raised by motion. At the same time, *Gelsomino v. Gorov*, 149 Ill.App.3d 809, 502 N.E.2d 264, 104 Ill.Dec. 1 (1st Dist. 1986) (decided on summary judgment), held that while the defense that the lawyer was only exercising his or her own judgment may apply, a jury in that case would decide if the lawyer’s judgment was still within the bounds of the acceptable standard of care.

It should be noted that in *Gelsomino* many of the malpractice allegations dealt with the alleged lack of proper investigation combined with the lack of preparation of the plaintiff’s claim,

in addition to failing to introduce evidence at trial. Traditionally, decisions of whether to introduce evidence were deemed to fall within the realm of the fair exercise of a trial lawyer's judgment. *See, e.g., Woodruff, supra; Oda v. Highway Insurance Co.*, 44 Ill.App.2d 235, 194 N.E.2d 489 (1st Dist. 1963). These cases held that matters of exercise of a trial lawyer's professional judgment could not be the basis of attorney liability.

Due to lack of clarity in Illinois following *Gelsomino*, it is worth observing that the "judgment rule" is applied in other jurisdictions. *See, e.g., Simko v. Blake*, 448 Mich. 648, 532 N.W.2d 842, 847 (1995) ("There is no motion that can be filed, no amount of research in preparation, no level of skill, no degree of perfection that could anticipate every error or completely shield a client from the occasional aberrant ruling of a fallible judge or an intransigent jury."); *Estate of Mitchell v. Dougherty*, 249 Mich.App. 668, 644 N.W.2d 391 (2002) (attorney's failure to file medical malpractice action before statute of limitations expired did not support malpractice claim because lawyer investigated case and made judgment not to pursue case due to his honest belief that it lacked merit). *See generally* Ronald E. Mallen and Jeffrey M. Smith, LEGAL MALPRACTICE Ch. 18 (2005).

The judgmental immunity defense may often involve factual questions requiring adjudication on a complete record. Still, when the lawyer's questioned advice or conduct does involve a matter of judgment, a judgmental immunity or the "judgment rule" may be a proper consideration to be raised by motion to dismiss.

(9) [6.24] Motion practice malpractice

It is not malpractice to fail to make a motion that has little chance of being granted. Generally, an attorney cannot be held liable for every mistake in the practice of law. The motion within the case is particularly apropos for early determination by the court.

**3. Considerations of the Answer**

*a. [6.25] Insufficient Knowledge*

In answering a legal malpractice complaint, the underlying case within a case requires the pleading of factual matters that are not within the personal knowledge of the defendant attorney. Under 735 ILCS 5/2-610, "[e]very answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates." Except for allegations of damages, every allegation not explicitly denied is admitted, unless the party states in his or her pleading that he or she has no knowledge thereof sufficient to form a belief and attaches an affidavit of the truth of the statement of want of knowledge or unless the party has had no opportunity to deny. Often in legal malpractice actions, the underlying subject matter may be outside the actual knowledge of the defendant and, therefore, an affidavit of insufficient knowledge may be required.

*b. [6.26] Admissions of Error*

In cases of clear negligence, such as a missed statute of limitations, the defendant may admit the breach of standard of care but deny proximate causation and damages, and either require the

plaintiff to plead and prove the valid underlying case or defense that would have succeeded or raise another affirmative bar to recovery. *See, e.g., Cook v. Gould*, 109 Ill.App.3d 311, 440 N.E.2d 448, 64 Ill.Dec. 896 (3d Dist. 1982). A lawyer's integrity being paramount in maintaining an effective defense, effort should be made to avoid "crafty" or "hyper-technical" denials that may later be used at trial on cross-examination to demonstrate a lack of candor by the attorney or even impeachment. Accordingly, when a forthright admission is required, it should be made. On the other hand, the defendant may reasonably admit only the allegation that is properly and accurately stated.

*c. [6.27] Underlying Pleadings Are Not Binding*

A lawyer is not bound by the underlying pleadings he or she has filed or prepared for a client. Therefore, the fact the defendant lawyer prepared and/or filed a complaint, or filed one or even prosecuted the case to conclusion, does not operate as an estoppel or bar against the attorney in denying a valid underlying claim. *Ignarski v. Norbut*, 271 Ill.App.3d 522, 648 N.E.2d 285, 207 Ill.Dec. 829 (1st Dist. 1995). Similarly, an unsuccessful attorney's statement that he thought the client had a viable underlying claim is not a judicial admission and the lawyer is entitled to contest the underlying case within the case. *Orzel v. Szewczyk*, 391 Ill.App.3d 283, 908 N.E.2d 569, 330 Ill.Dec. 381 (1st Dist. 2009). A defendant attorney's denial of the validity of the underlying case and the nature and extent of damages should not impugn the lawyer's integrity or be impeaching because it is the client's burden to establish the validity of the underlying case. *See, e.g., Warren v. Williams*, 313 Ill.App.3d 450, 730 N.E.2d 512, 246 Ill.Dec. 487 (1st Dist. 2000); *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill.App.3d 784, 767 N.E.2d 470, 263 Ill.Dec. 19 (1st Dist. 2002). Even with a lawyer's obvious negligence, for example, by allowing a statute of limitations to expire, "it is incumbent upon the client to prove that the negligence was the proximate cause of his loss." *Cook v. Gould*, 109 Ill.App.3d 311, 440 N.E.2d 448, 450, 64 Ill.Dec. 896 (3d Dist. 1982).

*d. [6.28] Affirmative Defenses*

There is no completely satisfactory definition of what factual and legal defenses are clearly affirmative defenses in a legal malpractice action.

(1) [6.29] Separate defenses

Consideration should be given to 735 ILCS 5/2-603(b), which states:

**Each separate cause of action on which a separate recovery might be had shall be stated in a separate count or counterclaim, as the case may be and each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation.**

In other words, each affirmative defense should be alleged separately, should set forth the facts on which it is based, and should not be made in a conclusory fashion. Additionally, under §2-602, if a defense is pled, a reply shall be filed by the plaintiff, although a reply is not required if the claim is brought in federal court.

(2) [6.30] Affirmative matter in the case within a case

Because legal malpractice cases most often involve a case within a case, certain defenses applying to them may be deemed affirmative matters. However, if the plaintiff alleges that the underlying personal injury case was lost due to the lawyer's negligence, the question arises as to whether the lawyer needs to raise the affirmative defenses that would have applied to defeat the underlying case and whether, by pleading them, accepts the burden of proving them. No Illinois case has been found requiring the defendant attorney to raise defenses existing in the underlying matter as affirmative matter in the legal malpractice answer. Arguably, because the plaintiff bears the burden of proving the merit of the underlying case, the attorney's simple denial of the validity of the underlying case or defense may be sufficient and in keeping with the expectations of burden of proof.

(3) [6.31] Traditional affirmative matter

Affirmative matters that should be pled include the statute of limitations, statute of repose, contributory negligence of the plaintiff, contributory negligence of the plaintiff's agents and/or successor attorneys, illegality of the underlying transaction, and/or unclean hands. Other affirmative matters include those customarily raised and listed in Code of Civil Procedure §2-619 such as jurisdiction; lack of legal capacity; pending litigation between the parties; that the cause is barred by a prior judgment; collateral estoppel; limitations; release, satisfaction, or discharge in bankruptcy; statute of frauds; unenforceability due to minority or disability; and "that the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a).

(4) Special considerations of comparative negligence and contributory fault

(a) [6.32] Implication of other counsel

When the plaintiff client may have consulted a number of attorneys with respect to his or her legal matter, the legal malpractice defendant will need to consider and weigh the benefits of alleging the comparative or contributory negligence of the plaintiff and/or his or her other lawyers, whether they be referring, co-, prior, or subsequent counsel. The negligence of a plaintiff's other lawyer for flawed delivery of legal services is ascribed to the plaintiff client. Under those circumstances, the comparative negligence comes into play. If the plaintiff's subsequent attorney's negligence was the cause of the plaintiff's injury, then it is logical for the subsequent lawyer's misconduct to reduce the defendant's liability on comparative negligence grounds to the same degree that the negligence entitles a defendant to a contribution action against the subsequent attorney. This was the analysis followed in *Ragusa v. City of Streator*, 95 F.R.D. 527 (N.D.Ill. 1982), in which the federal district court determined that any judgment against the defendants is reduced to the extent that the plaintiff's lawyer was found negligent. The court reasoned that a contribution action against that attorney was unnecessary as the net result would be the same — a reduction of the plaintiff's recovery by the proportionate amount of his subsequent attorney's comparative negligence.

A plaintiff's current counsel may try to avoid third-party liability on public policy considerations. In *Roberts v. Heilgeist*, 124 Ill.App.3d 1082, 465 N.E.2d 658, 80 Ill.Dec. 546 (2d Dist. 1984), a malpractice defendant sought to bring a third-party contribution action against his former client's current counsel on the basis that that counsel failed to salvage the plaintiff's claim by not filing an action even though the statute of limitations had expired. While the court held that such a maneuver would have been a pursuit of "fruitless" litigation, it stated a belief that Illinois public policy favoring the right to choose counsel would disallow the contribution action on public policy grounds. Since that time, contribution cases against prior and subsequent counsel have been more common. See *Alper v. Alzheimer & Gray*, 65 F.Supp.2d 778 (N.D.Ill. 1999); *Faier v. Ambrose & Cushing, P.C.*, 154 Ill.2d 384, 609 N.E.2d 315, 182 Ill.Dec. 12 (1993); *Brown-Seydel v. Mehta*, 281 Ill.App.3d 365, 666 N.E.2d 800, 217 Ill.Dec. 131 (1st Dist. 1996). Accordingly, thought must be given to the strategy of pleading of potential contributory negligence of a plaintiff based on the negligence of his or her agents, whether it be attorneys, accountants, or others. One strategy is to name these third parties as witnesses whose fault is attributable to the plaintiff rather than to expand litigation to include them as third-party defendants for contribution. On the other hand, this may be impractical due to considerations of adding necessary parties, privilege issues, and the amount of the defendant's own insurance and the potential for high exposure. In the last situation, pursuit of third parties may be warranted.

(b) [6.33] The defendant's potential third-party claims

Generally, a legal malpractice case is considered a tort arising out of a contractual relationship. While it may be pled in the alternative, as a tort or contract, or may be pled as breach of fiduciary duty, generally, a legal malpractice case is subject to §2 of the Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.* Increasingly, attorneys have been subjected to third-party complaints for contribution in legal malpractice. See generally Chapter 5 of this handbook. The following are some considerations for pursuing third-party actions for contribution against the plaintiff's current or subsequent counsel or other professionals.

(i) [6.34] Limitations considerations

Section 13-204 of the Code of Civil Procedure applies to actions seeking recovery for contribution and indemnity. The text of this limitations section is technical and should be reviewed for precision. Section 13-204(a) states that when "no underlying action seeking recovery for injury to or death of a person or injury or damage to property has been filed by a claimant, no action for contribution or indemnity may be commenced with respect to any payment made to that claimant more than two years after the party seeking contribution or indemnity has made the payment of discharge of his or her liability to the claimant." 735 ILCS 5/13-204(a). Section 13-204(b) states:

**In instances where an underlying action has been filed by a claimant, no action for contribution or indemnity may be commenced more than two years after the party seeking contribution or indemnity has been served with process in the underlying action or more than two years from the time the party, or his or her privy, knew or should reasonably have known of an act or omission giving rise to the action for contribution or indemnity, whichever period expires later. 735 ILCS 5/13-204(b)**

Due to the fairly long period of limitation for bringing third-party actions against prior or subsequent counsel representing the plaintiffs, discovery may be appropriate to determine the level of liability and the benefit of pursuing contribution against other lawyers or professionals. As noted above, consideration should be given to pleading affirmatively the errors or omissions of agents such as other attorneys as matters of imputed contributory negligence.

(ii) [6.35] Other considerations

There are other factors that affect the decision to pursue third-party claims for contribution against a plaintiff's current or subsequent counsel:

**Expense.** In deciding whether to add additional parties, the defense should consider whether to do so would unduly increase the cost of litigation and whether it would result in damaging finger-pointing among the attorneys.

**Plaintiff's current counsel.** While no case has specifically held that the plaintiff's current malpractice counsel is immune from third-party liability, an action against current counsel may arguably violate public policy by depriving the plaintiff of his or her right to counsel. In *Roberts v. Heilgeist*, 124 Ill.App.3d 1082, 465 N.E.2d 658, 80 Ill.Dec. 546 (2d Dist. 1984), the appellate court, in dicta, suggested that such actions may not be approved under public policy grounds. Because the case was decided on other grounds, the issue of the viability of third-party actions for contribution against a plaintiff's current counsel was left for future decision.

**Considerations of insurance — coverage and risk management.** When multiple attorneys may share responsibility for a loss, a defendant may feel it necessary to file third-party actions for contribution, particularly when his or her insurance coverage may be inadequate or when damages may exceed his or her insurance limits. In that contingency, it may be inadequate protection to simply claim comparative negligence of the subsequent counsel with the hope that the ultimate damage may be reduced, and participation of another lawyer's insurers certainly may induce an earlier resolution of the case. On the other hand, other counsel may vigorously oppose a hostile action particularly because it may implicate the attorney-client privilege. *See, e.g., Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240, 244 Ill.Dec. 941 (2000) (Illinois Supreme Court held inviolate attorney-client privilege regarding communications with subsequent counsel regarding merits of legal malpractice case as opposed to underlying representation). The expense of litigating privilege issues alone may be an important factor in considering third-party actions. However, when the defendant attorney's responsibility may be slight as compared to the liability of other attorneys, contribution actions are pursued. In those instances, the defendant attorney, in effect, becomes a third-party plaintiff who must then meet his or her burden of proof of the facts and standard of care.

## C. Considerations Regarding the Jury

### 1. [6.36] The Plaintiff's Perspective

Under 735 ILCS5/2-1105(a), the plaintiff must file a jury demand at the time the action is commenced. It is difficult to imagine circumstances in which a legal malpractice plaintiff would

not demand a jury at the commencement of the litigation. Within the general public, a consensus exists that does not hold lawyers in high esteem (even if people may place great trust in their own personal attorneys). A jury that is naturally sympathetic to the client or antagonistic to the defendant attorney is more likely to side with the client on issues of liability and damages in a close case. In addition, if the plaintiff fails to demand a jury at the time the complaint is brought, the plaintiff will be deemed to have waived his or her right to one, and there is little that can be done to get back that right.

There may be certain times, however, when it is in the legal malpractice plaintiff's best interest to waive a jury once it is clear that the matter is going to trial. For example, if, for whatever reason, the jury will not find the plaintiff appealing (because of his or her occupation, level of wealth, ability to testify in an effective manner, etc.), the case possibly should be tried as a bench trial.

Similarly, certain purported violations of the standard of care may rest on technical legal grounds (for example, some conflict of interest grounds can become academic exercises), and a judge, rather than a jury, may be better suited to understand the nuances of the case when the foundation of the breach is less obvious.

If possible, the plaintiff's counsel should attempt to determine the assigned judge's track record for legal malpractice cases (either as a bench or jury trial). Some judges, like some attorneys, find legal malpractice claims to be "distasteful" and may have a pro-defense bias when presiding over them. In those circumstances, the plaintiff should determine whether it is appropriate to file a motion to substitute as a matter of right (pursuant to 735 ILCS 5/2-1001) before any substantive ruling is made.

On the flip side, an investigation may reveal that the assigned judge is known to look disapprovingly on attorneys who allegedly have breached the standard of care owed to their clients. When that situation occurs, the plaintiff's counsel most likely would not waive the client's right to jury. Again, any decision that relates to waiving the right to trial by jury should be explained thoroughly to the client in advance of any decision to forego that right.

## **2. [6.37] The Defendant's Perspective**

The legal malpractice defendant must also decide whether to seek a jury trial or a trial by judge. If the plaintiff has filed a jury demand, the defendant may appear and rely on that demand. 735 ILCS 5/2-1105. Whether to submit a case for determination by a judge or jury involves many considerations of strategy beyond the scope of this chapter. Because there may be a perception that juries may be unduly critical of lawyers or may not understand complicated legal issues, some defendants opt to have the case heard by a judge alone. Others prefer to have the protection of a jury based on the belief that a judge may be more apt to apply his or her own judgment on the standard of care and even disregard conflicting expert opinion testimony. As a matter of law, however, a trial judge sitting without a jury may not substitute his or her own independent knowledge of applicable standards of care for competent expert legal witness testimony. *Sheetz v. Morgan*, 98 Ill.App.3d 794, 424 N.E.2d 867, 54 Ill.Dec. 117 (2d Dist. 1981). Therefore, with or without a jury, the expert testimony requirement must be met.

Regardless of whether the matter proceeds to a bench or jury trial, the judge will almost always play an important, if not a determinative, role in a legal malpractice trial because of the questions of law that often arise that are not appropriate for resolution by a jury.

### 3. Questions of Law

#### a. [6.38] In General

A right to a jury trial in legal malpractice depends on the question to be determined and the considerations of the proper roles of the jury and the judiciary. Thus, Illinois courts have consistently held that the trial judge, not the jury, must decide legal issues in legal malpractice actions. *See, e.g., Environmental Control Systems, Inc. v. Long*, 301 Ill.App.3d 612, 703 N.E.2d 1001, 234 Ill.Dec. 901 (5th Dist. 1998) (proximate causation in appellate malpractice case, *i.e.*, whether result in appeal would have been different but for attorney's alleged malpractice, is to be decided by judge and not by jury). Thus, while legitimately disputed questions of the standard of care and breach of duty may be properly submitted to a jury for determination, through the testimony of expert witnesses, the question of whether a breach of duty would have proximately caused any damages may be reserved to the court.

As an example, *A.O. Smith Corp. v. Lewis, Overbeck & Furman*, 777 F.Supp. 1405 (N.D.Ill. 1991), *rev'd on other grounds*, 979 F.2d 546 (7th Cir. 1992), involved an allegation that the defendant law firm failed to tender antitrust jury instructions needed to preserve certain defenses for appeal. The plaintiff alleged it would have prevailed on appeal if the defense theory had been properly preserved. The trial court held that “[j]urisdictions that have spoken on this issue have uniformly declared that the trial judge in a malpractice case must consider legal issues raised in the underlying case from the standpoint of the ‘reasonable judge.’” 777 F.Supp. at 1408 – 1409.

Illinois courts have subscribed to the policy that when it is the province of the court to determine the law, it is deemed improper for a jury to usurp that role. As the Michigan Supreme Court noted in the often-cited case *Charles Reinhard Co. v. Winiemko*, 444 Mich. 579, 513 N.W.2d 773, 782 – 783 (1994):

**Juries traditionally do not decide the law or the outcome of legal conflicts. Juries are not appellate courts. To maintain the traditional role of the jury, the jury must remain the fact finder; a jury may determine what happened, how, and when, but it may not resolve the law itself. The determination of questions of law by the court is not a new elitist prerogative — to the contrary it is a vindication of the existence of a judiciary. Indeed, it is the very purpose of a judiciary.**

Certain judicial powers are not in the jury's province. When decisions on motions and other functions reserved to judges are necessary for determining the underlying case they are proper questions for resolution by the trial court. An Illinois appellate court has agreed that when a plaintiff's legal malpractice action was dependent on proving that the underlying trial court would have approved a minor's settlement, it was the duty of the malpractice trial court to determine whether the underlying court would have approved the alleged “missed” settlement on behalf of the minor. The Illinois appellate court stated that, under the circumstances, to let the jury decide

this issue would be giving them a power in the context of a legal malpractice case that they would not normally possess. Therefore, the outcome was deemed a matter of law for the court to decide in the legal malpractice case. *First National Bank of LaGrange v. Lowrey*, 375 Ill.App.3d 181, 872 N.E.2d 447, 313 Ill.Dec. 464 (1st Dist. 2007).

*b. [6.39] Appellate Review*

In determining whether a failure to perfect an appeal was the proximate cause of injuries, an Illinois court of appeals held that that was a question of law, as the success of the underlying issues was a question of law. *Governmental Interinsurance Exchange v. Judge*, 356 Ill.App.3d 264, 825 N.E.2d 729, 292 Ill.Dec. 141 (4th Dist. 2005).

*c. [6.40] Bankruptcy Malpractice*

While no Illinois court has decided the question, the Utah Supreme Court held in *Harline v. Barker*, 912 P.2d 433 (Utah 1996), that when the underlying case is a bankruptcy proceeding and only a bankruptcy court could have decided the issues in the underlying suit in the first instance, then the malpractice plaintiff was not entitled to a jury in the malpractice action to decide what the outcome of the underlying suit would have been absent the attorney's negligence. *Harline* rejected the view that the dividing line in determining the responsibility of judge and jury runs between questions of law and questions of fact only. The court found

**no reason why a malpractice plaintiff should be able to bootstrap his way to having a lay jury decide the merits of an underlying "suit within a suit" when, by statute or other rule of law, only an expert judge could have made the underlying decision. It is illogical, in effect, to make a change in the law's allocation of responsibility between judge and jury in the underlying action when that action is revisited in legal malpractice actions and thereby distorts the "suit within a suit" analytic model.** 912 P.2d at 440.

*d. [6.41] Matrimonial Malpractice*

Because of the intense nature and high personal stakes involved in matrimonial disputes, matrimonial lawyers can be subjected to a significant number of claims by their former clients. Matrimonial lawyers operate under the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.* Section 103 of the IMDMA states: "There shall be no trial by jury under this Act." 750 ILCS 5/103. In matrimonial litigation, the trial judge alone should determine issues pertaining to dissolution of a marriage, property division, and custody. In a legal malpractice action alleging an underlying mistake in the handling of a divorce settlement or prove-up of custody or the like, should a judge or jury decide the issue of what would have occurred in the underlying case when that question in the context of matrimonial litigation is not a purely legal question but one involving factual determinations and apportionment of property and considerations of equity as defined by law? While no Illinois case has been decided directly on point, for public policy reasons there is persuasive support for the view that such issues affecting proximate causation could be decided only by an expert judge applying the factors set forth in the IMDMA and in equity. This argument may extend to other potential claims for legal malpractice when the underlying matter would be more properly or necessarily submitted only to a court.

e. [6.42] *Countervailing Argument*

The plaintiff in the legal malpractice case understandably may prefer to have all issues decided by the jury and may argue that any other rule would invade the right to a jury trial. Other than the question of appellate malpractice, there are few Illinois decisions concerning this issue. Ultimately, based on the appellate court's analysis in *Environmental Control Systems, Inc. v. Long*, 301 Ill.App.3d 612, 703 N.E.2d 1001, 234 Ill.Dec. 901 (5th Dist. 1998), the right to a jury trial in a legal malpractice action may depend on considerations of the proper distinction between the roles of the jury and the judiciary in the underlying matter.

f. [6.43] *Underlying Punitive Damages*

In *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill.2d 218, 856 N.E.2d 389, 305 Ill.Dec. 584 (2006), the Illinois Supreme Court held that lost punitive damages are not recoverable in a subsequent action for legal malpractice. In the underlying case, an attorney malpractice action was brought by plaintiff Tri-G, Inc., against the law firm of Burke, Bosselman and Weaver (BBW). BBW represented Tri-G in a suit against Elgin Federal Savings & Loan for fraud and breach of contract in connection with a real estate transaction. When the case was called for trial, the BBW trial partner on the case indicated that he was not ready to proceed and asked for a continuance, which the trial court refused. Tri-G then filed a malpractice action against BBW, alleging that it was negligent in handling the underlying case.

In the malpractice trial, the circuit court held a "trial within a trial" and permitted the jury to determine what amount Tri-G would have obtained from Elgin Federal but for BBW's negligence — including both compensatory and punitive damages. The verdict against BBW included half the sum of punitive damages that the malpractice jury thought the original jury in the underlying case would have assessed against Elgin Federal. The appellate court affirmed the verdict, adopting the Kansas Supreme Court decision *Hunt v. Dresie*, 241 Kan. 647, 740 P.2d 1046 (1987), as persuasive.

As a matter of first impression, the Illinois Supreme Court reversed the appellate court, and held that punitive damages are not recoverable in a subsequent action for legal malpractice. The court supported its holding on various grounds. First, the court noted that punitive damages are, "not awarded as compensation, but serve instead to punish the offender and to deter that party and others from committing similar acts of wrongdoing in the future." *Tri-G, supra*, 856 N.E.2d at 417. Holding the firm liable for the punitive damages resulting from the misconduct of a third party, "tears the concept of punitive damages from its doctrinal moorings." *Id.*

Furthermore, Code of Civil Procedure §2-1115 specifically bars recovery of punitive damages in a legal malpractice action. The court concluded that if the legislature has decided that lawyers cannot be compelled to pay punitive damages based on their own misconduct, it would be "completely nonsensical to hold that they can nevertheless be compelled to pay punitive damages attributable to the misconduct of others." *Id.*

### III. DISCOVERY

#### A. [6.44] Plaintiff's Written Discovery

Lawyers are known for “putting it down” in writing in one form or another when handling legal matters — whether through the recording of their time or their use of correspondence, memoranda, or notes to “confirm” various events. This penchant for contemporaneously documenting events can provide a timeline that the attorney will have difficulty disputing. As a result, a jury may question the attorney’s credibility when the attorney failed to document a relevant happening to which he or she is now testifying. At the same time, the defendant attorney will rely on these documents to bolster his or her version of events and to attack the plaintiff’s position if those documents concern a disputed issue. In this context, the request to the defendant to produce documents pursuant to S.Ct. Rule 214 is a key tool of the legal malpractice plaintiff.

At this time, the Illinois Supreme Court has not sanctioned a set of form interrogatories for legal malpractice claims. While there are innumerable approaches a plaintiff can follow in using written interrogatories under S.Ct. Rule 213, one can argue that written interrogatories directed to the defendant attorney should not seek narrative responses (*i.e.*, the substance of each communication between the defendant attorney and the plaintiff client), since what will likely result are “canned” responses that the defendant’s counsel has carefully prepared. Questions of this sort may be better left for deposition, where it is more difficult to “script” an answer.

Because of the fact-specific nature of legal malpractice claims, it is hard to articulate a “standard” set of discovery that a plaintiff should serve on a defendant attorney. However, the following documents should be requested beyond merely seeking the “attorney’s file”:

1. The retainer agreement between the attorney and the client.
2. Any opening “client form” or “matter form” or “file jacket” that the defendant created concerning his or her representation of the plaintiff. Some firms, especially larger ones, use these documents as a matter of procedure to avoid conflicts of interest and to track attorneys’ client generation. If there is or was an ongoing relationship between the parties, there may be multiple “matter forms” for one client.
3. All timesheets, handwritten and computer-generated, relating to the representation of the plaintiff. Attorneys often use handwritten timesheets from which entries are made into billing software. Since billing programs allow the attorney to edit entries before an invoice is sent to the client, the handwritten timesheet may contain information not found on a finalized invoice. An attorney may not have kept time records if the client was to be charged a “contingent fee” in the underlying matter (*e.g.*, in a personal injury case). However, even in “contingent fee” cases, attorneys often keep contemporaneous time records even if they do not invoice the client for that time.
4. All invoices the attorney prepared for services rendered to the client. Again, a finder of fact is likely to give significant weight to the entries on the defendant’s invoice or a timesheet based on the supposition that they were contemporaneously and (hopefully) honestly made. In

addition, timesheets and invoices provide evidence of the identity of other attorneys from the defendant's firm who participated in the representation and other relevant nonparty witnesses.

5. All documents concerning any payment the client made to the attorney.

6. All documents concerning any communication between the client plaintiff and the attorney.

7. All documents concerning any communication between the defendant and any other person concerning the matter at issue. Among other things, the plaintiff's attorney should verify that the defendant has produced all e-mail communications that the defendant may possess relating to the plaintiff. E-mails (either to persons outside or inside the firm) are another form of contemporaneous record-keeping on which the finder of fact will place significant weight.

8. If the underlying matter involves litigation, all pleadings, orders, etc., relating to that matter. If the matter involves a transaction, request not only the final agreements (which the client should have in his or her possession anyway), but also any drafts of that final agreement, as drafts often provide relevant evidence in a transactional malpractice case (*e.g.*, who drafted the provision at issue or how that provision found its way into the final agreement). Also, in claims of this type, lawyers may use forms from other transactions or "form books" to draft agreements. These forms should also be requested.

9. All diaries or other calendars that refer to the plaintiff (allowing for redaction of other entries unrelated to the plaintiff).

10. All other notes, memoranda, correspondence, etc., concerning the plaintiff.

11. All written policies or procedures the defendant had in place concerning the representation of clients.

12. All documents that describe the background of the defendant attorney and any qualifications or expertise of that attorney (or attorneys of the defendant who represented the plaintiff). The plaintiff's attorney should determine whether the defendant uses a Web site to promote his or her practice. Web sites often contain statements about the attorney's qualifications or expertise that the plaintiff can possibly use to his or her advantage.

13. All statements of any person who may have knowledge of any material facts concerning the plaintiff's complaint and the defendant's answer.

14. All documents concerning any similar claim that has been made against the defendant attorney.

As to S.Ct. Rule 213 written interrogatories, the plaintiff should use this aspect of discovery to identify witnesses who may have knowledge of the facts relating to the legal malpractice claim. For example, if the defendant is a law firm, an interrogatory should request the defendant to identify all of that firm's personnel, including attorneys and paralegals, who participated in the

plaintiff's representation. If the plaintiff is a company, the names of all persons who communicated with the defendant should be sought. Likewise, an interrogatory should request the name of any other attorneys who participated in the underlying matter, possibly perhaps on behalf of an adversary or other party to a transaction, etc.

Also, the plaintiff should request information concerning the availability of liability insurance for the defendant for this claim. Again, the plaintiff's counsel should verify that the defendant's insurer has received timely notification of the claim (if necessary, writing a letter to that insurer notifying it of the claim) to avoid any future declination of coverage due to deficient notice.

The defendant should be asked to identify any other claim that has been made against the defendant for similar conduct. While that claim may ultimately not be admissible, either pleadings the defendant filed or statements made in a deposition may provide admissions that can be used to impeach the defendant attorney.

Requests to admit facts pursuant to S.Ct. Rule 216 should be considered if they can be used to resolve issues such as the nature and scope of the attorney-client relationship.

It is equally important for the legal malpractice plaintiff to obtain documents from relevant nonparty witnesses through depositions and subpoenas issued pursuant to S.Ct. Rule 204. The plaintiff's attorney must always remember that he or she is trying two cases — the one against the defendant attorney to show that a breach of the standard of care occurred, and the “case within the case,” in which the plaintiff must prove that a different result would have occurred but for the defendant's breach. Written and oral discovery of nonparty witnesses almost always must be employed to develop the evidence needed to “win” that second case.

## **B. Defendant's Written Discovery**

### **1. [6.45] General Considerations**

Generally, the defendant in a legal malpractice case may have an advantage if he or she has maintained a proper file including all correspondence, billing records, and notes of all communications both in writing and in electronic form. A common error by attorneys who are discharged is the failure to maintain a complete copy of the file evidencing all of the work product performed and communication on a matter.

### **2. [6.46] Mandatory Record-Keeping and Proof of Malpractice Insurance**

Illinois Supreme Court Rule 769 requires attorneys to maintain records and states:

**It shall be the duty of every attorney to maintain . . . the following:**

**(1) records which identify the name and last known address of each of the attorney's clients and which reflect whether the representation of the client is ongoing or concluded; and**

**(2) all financial records relating to the attorney's practice, for a period of not less than seven years, including but not limited to bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns and tax reports.**

Illinois Supreme Court Rule 756(e) also requires attorneys to disclose whether they have malpractice insurance and to maintain records of that insurance for seven years from the date of disclosure:

**As part of registering under this rule, each lawyer shall disclose whether the lawyer has malpractice insurance on the date of the registration, and if so, shall disclose the dates of coverage for the policy. The Administrator may conduct random audits to assure the accuracy of information reported. Each lawyer shall maintain, for a period of seven years from the date the coverage is reported, documentation showing the name of the insurer, the policy number, the amount of coverage and the term of the policy, and shall produce such documentation upon the Administrator's request.**

### **3. [6.47] Discovery of Documents and Evidence**

Because most defendants will have a file from which to work and will have familiarity with the legal representation, records, documents, and evidence, the defendant may have an advantage at the beginning of a case. The most important consideration is to obtain, as soon as possible, all documents, evidence, and the identity of witnesses from any source that will assist in the defense of the action. Discovery in a legal malpractice claim will be compounded because of considerations of the case within a case. Quite often, a disgruntled client will have seen one or more subsequent or prior attorneys with his or her legal problem. Therefore, in conducting written discovery regarding legal malpractice, it is important to pursue the following:

- a. Obtain all contracts for legal services defining the scope, terms, or limits of the representation.
- b. Find out if the client contacted other attorneys regarding his or her legal problem, and, if so, obtain the dates of the contacts and the identities of the attorneys. Determine if attorney-client contracts have been formed with those lawyers.
- c. Identify all communications with prior or subsequent counsel regarding the client's legal matters, and find out whether the client has been involved in other litigation or given depositions or testimony in other matters.
- d. Discover the location of all documents supporting the plaintiff's claim for damages and, in particular, all documents that support the client's claim of a valid underlying cause of action or defense or right.

e. In cases involving underlying litigation, counsel should learn if any insurers or any parties have maintained any claims or litigation files. Insurers are in the business of maintaining very detailed files concerning litigation, and these may provide valuable documentation concerning the validity (or invalidity) of the plaintiff's claim. These files also contain information concerning such matters as independent medical examinations, liability assessment, limits of available insurance (pertaining to collectibility and solvency), and a considerable amount of documentation that may be helpful to the defense.

f. If the plaintiff has filed for bankruptcy, obtain all bankruptcy filings and schedules. Whether the plaintiff has filed for bankruptcy may be determined if the plaintiff has failed to disclose his or her legal malpractice claim as an asset in bankruptcy and may have waived his or her claim, or perhaps the plaintiff's liability has been discharged, or the plaintiff has placed a value on his or her claim or has contradicted the allegations of his or her complaint.

g. The plaintiff should identify all witnesses who have knowledge relevant to the underlying case within a case as well as all witnesses with knowledge material to the allegations of breach of standard of care.

h. If the underlying matter involves a transaction, determine from the other contracting party to the transaction or his or her counsel whether the plaintiff has performed all conditions and whether the other contracting parties would have altered the consideration or acted in a manner as the plaintiff has represented in his or her "but for" world.

i. If the plaintiff has retained prior or subsequent counsel, subpoena the counsel's files. Even though questions of privilege may arise, it is far better to seek these records promptly than to wait until they are possibly destroyed or misplaced.

j. The defendant's document request should be broad enough to cover all documents, tangible things, and evidence that the plaintiff considers as proof of his or her claim of legal malpractice.

k. In cases involving underlying personal injury or medical malpractice actions, consider using standard interrogatories applicable to such actions.

l. In cases involving transactions, consider the discovery of bank loan applications, federal and state tax returns, and other certified documents or documents prepared under penalty of perjury. These documents are particularly useful because, on the one hand, they may reveal the truth of transactions due to their generally higher reliability, while, on the other hand, if they are untruthful, they may be valuable impeachment evidence.

m. Defense counsel also should not overlook the opportunity to inspect property, visit the scene of the underlying occurrence, conduct testing, and employ all means of discovery available under the Code of Civil Procedure and Supreme Court Rules.

#### **4. [6.48] Discovery of Opinion Testimony**

It is most critical to read and consider the requirements of disclosures of opinions and witnesses under S.Ct. Rule 213(f), which became effective July 1, 2002. These provisions largely govern the written disclosures of witnesses and opinions that are vital to the prosecution and defense of the legal malpractice action.

The preparation and disclosure of the expert witness are vital. Particular care should be made to ensure that the expert has been supplied with a complete file, including all deposition transcripts of all material witnesses and parties, all relevant and material documentation, and that the expert's file is as complete and as well-documented as possible. Because the defense may weigh heavily on legal theories, an adequately prepared witness should also be supplied with the pleadings, the plaintiff's disclosures, and all relevant motions demonstrating the theories of the parties. Finally, keep in mind that disclosures made to the defense expert are not privileged once the expert is disclosed. Therefore, all communications should be made with a view that they will ultimately be discovered by the opposing side and shown to the jury.

#### **C. [6.49] Special Discovery Issue — Privilege and Other Counsel**

When a client files a legal malpractice claim against his or her former attorney, the client generally waives the attorney-client privilege by placing the relationship "at issue." See, e.g., RPC 1.6(c)(3), which states that a lawyer may use or reveal "confidences or secrets necessary . . . to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct."

The issues of attorney-client privilege and attorney work product surface, however, in connection with the client's retention of what is known as "successor counsel." Generally, the successor counsel will usually represent the client in an area that is related to the subject matter of the legal malpractice lawsuit. The question has arisen as to whether, by bringing the malpractice action, the client has also waived the attorney-client and work product privileges of his or her successor attorney. The Illinois Supreme Court addressed this issue in *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240, 244 Ill.Dec. 941 (2000), when it held that no waiver had occurred as to successor counsel concerning advice sought regarding the malpractice.

In *Fischel & Kahn*, attorneys filed a complaint against a client (an art gallery) for the payment of legal fees; the client, in turn, counterclaimed for malpractice stemming from advice furnished by the law firm regarding consignment art contracts. 727 N.E.2d at 242. The underlying litigation in *Fischel & Kahn* involved claims brought by, among others, artists whose consignment works were destroyed in a fire at the gallery. The client had retained a law firm other than *Fischel & Kahn* to represent it in the fire loss litigation. *Fischel & Kahn* served discovery asking for communications between the former client and its attorneys in the fire loss litigation. Because the gallery was claiming damages from the defense and settlement of the underlying litigation on the basis of negligent representation of the gallery, *Fischel & Kahn* claimed that communications between the gallery and the attorneys who handled the fire loss

claims were central to their defense. The firm successfully argued in the trial court that access to the client's privileged communications with its new lawyers was necessary to defend against the counterclaim for malpractice and that the client waived the privilege when it asserted the malpractice claim.

The Supreme Court disagreed with the trial court and found that the client had waived only the attorney-client privilege with the attorneys who sued it and had not waived either the attorney-client privilege or work product protections with respect to its subsequent counsel. The court reasoned that to find otherwise would "unjustifiably curtail the privilege" and "unnecessarily undermine the purpose of the attorney-client privilege to encourage full and frank communication between attorneys and their clients." 727 N.E.2d at 244 – 245, 246.

A separate issue that may arise is whether the privilege and work product protections extend to "other counsel" that may have advised the client during the same period in which the legal malpractice allegedly occurred. To the extent the client was communicating with "other counsel" at the same time the client claims the defendant attorney engaged in malpractice, the defendant, under *Fischel & Kahn*, will likely have a strong argument that the privilege and protections normally applicable to that "other counsel" have been waived.

The plaintiff's attorney in a legal malpractice action should be wary of producing, without a court order, any information and/or documents of other counsel that would be privileged or protected, as a partial production can cause a complete waiver. If the court denies the defendant's request to produce on the grounds of privilege, the plaintiff, so as not to increase the chance of a negative impression with the jury, should file a motion in limine at the time of trial to bar the defendant from either commenting to the jury about the plaintiff's invocation of any privilege or seeking to elicit testimony in the jury's presence that will force the plaintiff to waive the privilege.

#### **IV. TRIAL OF THE LEGAL MALPRACTICE CASE**

##### **A. [6.50] In General**

The case-within-a-case aspect makes the legal malpractice action unparalleled for the trial lawyer. There is abundant room for creative trial tactics and strategies since reported decisions regarding the conduct of trials are rare. As one section of a treatise of this type cannot do justice to the topic, the discussion below is limited to a few brief points concerning the legal malpractice trial.

At the outset, the plaintiff will have to decide whether to lead with the standard of care case or the underlying case. Or, perhaps, the defendant will insist that a particular order is in the interest of justice, for example, when allegations against the attorney will impugn the attorney and proof of the underlying case may be questionable. A unique aspect of legal malpractice is that the defendant attorney does not necessarily possess relevant or admissible testimony regarding the validity of the underlying case, and a determination of the merits will be based on

independent witnesses and evidence. Also, witnesses to the underlying case may be weary of litigation and may be reluctant to give their full cooperation. For example, the adverse party in the underlying action may naturally be less concerned regarding the outcome of a legal malpractice claim and may not exhibit loyalty to either the plaintiff's or the defendant's case.

How the underlying case within a case will be tried is a paramount consideration. In a case involving a mishandled personal injury case, the plaintiff will need to prove that he or she would have collected a judgment in his or her favor. But when a lawyer is accused of a negligent defense of an action, the plaintiff will have to prove that the underlying case could have been properly defended. Making the underlying "but for" world palpable and understandable to a jury can be a major undertaking for even the most skilled trial lawyer.

The legal malpractice trial is complex in that many of the variables include proof of underlying legal principles. As an example, the plaintiff will have to prove the underlying law applicable to the defendant's standard of care because the jury's decision will be based on its acceptance or rejection of the predicate legal principles as demonstrated by the expert testimony. The jury will have a unique role in considering whether the lawyer adhered to acceptable standards of care under the circumstances and whether those circumstances include the existing law or facts. On the other hand, this situation is commonly addressed through jury instructions. Yet, the extent to which a judge will instruct the jury on the underlying law may differ from one case to the next.

#### **B. [6.51] Establishing the Standard of Care — The Need for Expert Testimony**

A legal malpractice plaintiff must present expert testimony to establish the standard of care against which the attorney's conduct will be measured. The failure to present expert testimony is generally fatal to a legal malpractice action, although an exception exists when the attorney's negligence is so apparent that a layperson would have no difficulty seeing it. In *Merritt v. Hopkins Goldenberg, P.C.*, 362 Ill.App.3d 902, 841 N.E.3d 1003, 299 Ill.Dec. 271 (5th Dist. 2005), the plaintiff's expert provided no basis for his claim that the value of the underlying case was greater than the settlement amount, and therefore failed to sufficiently establish proximate cause to sustain the jury's verdict. 841 N.E.2d at 1010 – 1011.

Like a medical malpractice action in which the testimony of the defendant doctor may suffice to establish the standard of care, the testimony of a defendant attorney may also suffice to prove the standard of care in a legal malpractice action. *Los Amigos Supermarket, Inc. v. Metropolitan Bank & Trust Co.*, 306 Ill.App.3d 115, 713 N.E.2d 686, 239 Ill.Dec. 155 (1st Dist. 1999).

At trial, a jury's (or judge's, in a bench trial) perception of the parties' respective expert witnesses almost always impacts the result in a legal malpractice trial. As in any case in which the "battle of the experts" may occur, the retention of the "right" expert for a party is key. In selecting an expert, the trial attorney must consider the impression that the expert will make with the finder of fact. As such, it is important to balance the qualifications and legal knowledge of the expert witness with his or her ability to communicate with the persons who ultimately must decide liability and damages. For example, a professor from a prestigious law school may be supremely knowledgeable and qualified to testify about a certain legal issue, but the effectiveness of that

expert may be limited at trial if he or she cannot articulate a position in plain English or if the witness is felt to be condescending in his or her attitude. It may be more beneficial to retain an experienced attorney as an expert who has stood in the shoes of the defendant (even if that attorney does not have a multipage curriculum vitae of accomplishments and articles) and can explain why, having been in the “trenches,” the defendant’s conduct either complied with or violated the applicable standard of care. In *Merritt, supra*, although the expert claimed the underlying case was worth between one and two million dollars, he admitted that he had tried only one wrongful death case to a verdict and that he had never gone to verdict in a wrongful death case in which the victim was a minor. 841 N.E.2d at 1011 – 1012. Furthermore, the expert admitted he had never picked a jury in the relevant county, nor had he done any research about settlements in the county. *Id.* Beyond failing to establish that the plaintiff could have recovered more than the settlement amount, these admissions likely undercut the expert’s credibility with the trier of fact.

Similarly, a party should consider the nature of any prior testimony the proposed expert may have given in other legal malpractice actions. If the witness has testified on numerous occasions and/or has testified consistently for either the plaintiff or the defendant, the expert may be attacked by the opposing party as a “professional witness.”

### **C. [6.52] Causation — The “Case Within the Case”**

The plaintiff has the burden of proving causation — that “but for” the attorney’s negligence, the plaintiff would have prevailed and, therefore, would not have suffered a pecuniary injury. *See Nika v. Danz*, 199 Ill.App.3d 296, 556 N.E.2d 873, 882, 145 Ill.Dec. 255 (4th Cir. 1990); *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill.App.3d 349, 703 N.E.2d 473, 476 – 477, 234 Ill.Dec. 612 (1st Dist. 1998). As the Seventh Circuit Court of Appeals observed in *Nicolet Instrument Corp. v. Lindquist & Vennum*, 34 F.3d 453, 455 (7th Cir. 1994): “Proof of causation is often difficult in legal malpractice cases involving representation in litigation — the vast majority of such cases — because it is so difficult, yet vital, to estimate what difference a lawyer’s negligence made in the actual outcome of a trial or other adversary proceeding.”

In *Nika, supra*, the court discussed the method for trying a legal malpractice case when the attorney is charged with negligently failing to file an action within the statute of limitations. The court stated that “the plaintiff must recreate and litigate the action which was never filed.” 556 N.E.2d at 882. The goal “is to establish what the result *should have been*” had the case been properly filed. [Emphasis in original.] *Id.* This occurs when two full “live” trials, the underlying action and the standard of care action, will be presented to and decided by the jury.

Different logistical questions, however, come into play when the alleged malpractice concerns alleged errors in the trial of the underlying action that the legal malpractice plaintiff contends caused an adverse result. The task of presenting the “but for” world of a legal malpractice case concerning a trial error can be daunting as the question becomes how should the evidence introduced at the underlying trial be presented to the malpractice jury along with the corrected matter the plaintiff asserts should have been introduced at that trial? When the lawyer has failed to call an expert witness or failed to proffer testimony that would have won the case or increased or reduced damages, the trial lawyers will need to convince the judge of the best way to

replicate the underlying trial within a trial and then to add those elements that the plaintiff contends were missing from the first trial — the missed evidence, the correct testimony, the appropriate jury instructions, etc. The proper approach to replicating the first trial and then inserting the additional factors is analogous to the replaying of a sporting event that has multiple possible outcomes, depending on the final play action. Then, the color commentary is superimposed on the replay (expert witnesses), and the action is rerun before a new audience (the jury) that will decide which probable outcome would have occurred. There is some caselaw to guide the practitioner and the court.

One response to this dilemma is found in the *National Union Fire Insurance Co. v. Dowd & Dowd, P.C.*, line of cases tried in the United States District Court for the Northern District of Illinois. See *National Union Fire Insurance Co. v. Dowd & Dowd, P.C.*, 2 F.Supp.2d 1013 (1998), *motion denied*, 191 F.R.D. 566 (1999), *overruled*, No. 97 C 6200, 1999 U.S.Dist. LEXIS 19857 (N.D.Ill. Dec. 23, 1999).

In this case, the plaintiff, National Union, sued its former defense counsel, claiming that a \$10 million jury verdict against National Union's insured in a personal injury trial was excessive and caused by defense counsel's failure to object to the admission of a life care plan for the plaintiff which set the cost of his future care at approximately \$4 million, on the ground that no proper medical foundation had been laid. The insurer contended that the plan would have been excluded from trial and damages would have been significantly reduced if defense counsel had made an objection. In addition, the firm was charged with malpractice for failing to timely disclose its expert witnesses, which resulted in the trial court barring their testimony.

To determine what would have happened in the underlying trial had the alleged defense been raised and witnesses disclosed and called, the trial court agreed that the entire underlying (*Miksis*) trial transcript be read to the federal jury by a group of actors playing the roles of the judge, questioning lawyers, and witnesses. The actors would be instructed not to "act" but to stay true to the characters portrayed. See Steve Darnall, *Think Your Lawyer is Lousy? Hire a Natural at Holding Court in Courtroom — An Actor*, Chicago Tribune, Apr. 4, 2001, at 7.

The defendant lawyers would also be allowed to call an additional expert witness whom they contend would have been a natural rebuttal witness to the testimony the insurance company claimed should have been admitted. Structuring the trial within a trial, the trial court entered the following unpublished order, providing, in part:

**[A]fter lengthy consideration, the court has concluded that it should allow the plaintiff to try their case-in-chief in substantially the way proposed in Plaintiff's Response to Defendants' Supplemental Proposal for the Rule 16 Conference. As the parties know, the court has been reluctant to adopt the theory that the entire *Miksis* transcript (covering that part of the earlier trial heard by the jury) must be read to the jury in this case, but it does so conclude.**

**The court also agrees with and adopts the plaintiff's argument that, after presenting the full underlying record the plaintiff may present to the jury the testimony and other evidence of defendants' alleged malpractice and of those expert**

witnesses who they believe should have been called by defendants in the earlier trial. The jury in this matter will be informed that the *Miksis* jury returned a verdict of 10 million dollars as well as the apportionment by that jury of fault to Schneider (5%) and Miksis (15%).

**Defendants will then present their case.**

**The court also agrees with this position argued by plaintiff that the jury should be informed of the law of this case to the effect that the defendant lawyers' standard of care was breached in a way that caused the debarment of eight potential expert defense witnesses.** *National Union Fire Insurance Co. v. Dowd & Dowd, P.C.*, No. 97 C 6200 (N.D.Ill. Nov. 9, 2000) (Memorandum and Order Summarizing Rule 16 Conference).

While many variables will come into play, the above procedure represents a practical approach to the problem. The salient features are the following:

1. The malpractice plaintiff will have the entire trial transcript read to the jury (by actors playing the parts of all of the participants, including the judge).
2. The plaintiff may submit additional evidence of the malpractice and the experts in evidence that should have been presented in the first instance.
3. The defendant attorney presents its case, supplying the missing rebuttal witnesses and its own experts supporting its compliance with the standard of care.
4. The defendant ought to be allowed to offer testimony and evidence that would have been admissible in the underlying case to counter the plaintiff's allegedly missed evidence and testimony.
6. The jury should be instructed as to the law applying to the underlying case if it is relevant to understanding the standard of care. (In the *National Union* cases, that was the law regarding timely disclosure of expert witnesses.)

The process of trying the trial within a trial was also discussed in *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812 (7th Cir. 1994), in which the Seventh Circuit Court of Appeals reversed a jury verdict in favor of the plaintiff because the trial judge refused to admit a transcript of the proceedings from the underlying action in the malpractice trial. The court stated:

**The serious error was the district judge's refusal to admit into evidence the transcript of the Weekley trial. A trial transcript is hearsay (though sometimes admissible, under an exception to the hearsay rule, Fed.R.Evid. 804(b)(1)) if offered to prove the truth of testimony presented at trial. But that was not the purpose for which Galvan wanted to put the transcript of the Weekley trial into evidence. Galvan wanted to show that the testimony of plaintiff's witnesses, whether truthful or not, was so extensive and so damaging to Transcraft that it was most unlikely**

**that anything Galvan could have done would have succeeded in defeating a judgment for the Weekleys or even in deflecting an award of punitive damages. 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.** 39 F.3d at 818.

*Accord Cook v. Continental Casualty Co.*, 180 Wis.2d 237, 509 N.W.2d 100, 105 (1993), in which the plaintiff alleged that his trial counsel failed to present witnesses necessary to proper apportionment of negligence. The trial court concluded that the best way to try causation and damages was to allow the second jury to determine the apportionment of negligence from the evidence as presented in the original action against the defendant, plus the additional testimony of the truck drivers who had not been called to testify at that trial.

When the underlying case is a criminal one, proof of an additional element is required before a plaintiff may recover for his or her criminal defense attorney's malpractice. In such a circumstance, the plaintiff must prove his or her innocence in the underlying criminal case. *Kramer v. Dirksen*, 296 Ill.App.3d 819, 695 N.E.2d 1288, 231 Ill.Dec. 169 (1st Dist. 1998). This is commonly referred to as the actual innocence rule.

The actual innocence rule also applies when the alleged legal malpractice resulted in an unfair penalty but not an improper conviction. *Paulsen v. Cochran*, 356 Ill.App.3d 354, 826 N.E.2d 526, 292 Ill.Dec. 385 (4th Dist. 2005). In *Paulsen*, the plaintiff was convicted of a Class 2 felony in Arizona. The plaintiff entered into a plea agreement with the State in which the fine levied against him was miscalculated in the plea agreement; *i.e.*, the fine was appropriate for the crime of which he was convicted but should have been reduced as a result of the plea. The plea agreement was reviewed by the plaintiff's counsel and signed by the plaintiff. After completing his sentence, he filed a lawsuit against his former counsel alleging that they caused him to "overpay his debt to society" and that he received an "excessively harsh" sentence as a result of his counsel including an improper fine in the plea agreement. 826 N.E.2d at 529. The court reasoned that Paulsen's case presented no reason to deviate from the actual innocence rule and that the case did not qualify as one in which an exception to the actual innocence rule would apply since "the cause of Paulsen's loss of cash and property was his intentional criminal conduct, not the negligence of his defense attorney." 826 N.E.2d at 534.

The reader is cautioned that at the time of this writing there are very few written opinions requiring a particular method be used to present the underlying trial to a jury in legal malpractice claims of this type.

#### **D. [6.53] Bifurcation — Severance**

In trying the legal malpractice case, it is useful to consider bifurcating or severing the underlying case within a case from the malpractice for standard of care trial. It may be more economical to try the simpler case first to see if the more cumbersome aspect may be avoided.

Different approaches are taken in the federal courts than in the state courts. Federal Rule of Civil Procedure 42(b) gives the trial judge discretion to bifurcate issues for trial “in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy.”

Most cases regarding bifurcation in legal malpractice trials advocate trying a liability case first, *i.e.*, letting the jury determine if the attorney’s actions breach the standard of care. Then, only if the jury finds the attorney committed malpractice does the second trial take place, with the jury deciding the damages attributable to the attorney’s negligence. *See, e.g., Cook v. Continental Casualty Co.*, 180 Wis.2d 237, 509 N.W.2d 100 (1993); *Fuschetti v. Bierman*, 128 N.J.Super. 290, 319 A.2d 781 (1974).

In *National Union Fire Insurance Co. v. Dowd & Dowd, P.C.*, 191 F.R.D. 566 (N.D.Ill. 1999), the trial court refused to bifurcate the underlying and legal malpractice cases, finding that the issues of liability and damages were “closely intertwined” as the defense counsel’s actions were alleged to have directly affected the strength, strategy, and outcome of the personal injury trial. The court could not “neatly separate” damages from liability. The *Dowd & Dowd* opinion notes two unpublished district court opinions that did bifurcate legal malpractice trials, *Graefe v. Connolly*, No. 82 C 3818, 1987 U.S.Dist. LEXIS 4077 (N.D.Ill. May 15, 1987) (bifurcating legal malpractice trial and requiring action to be first tried on issue of underlying defendant’s collectability), and *Overbey v. Jones*, No. 92-1078-K, 1992 U.S.Dist. LEXIS 14090 (D.Kan. Aug. 25, 1992) (allowing merits of never-filed medical malpractice claim to be tried prior to issue of liability for legal malpractice). 191 F.R.D. at 567.

The *Dowd & Dowd* court also relied on *Nika v. Danz*, 199 Ill.App.3d 296, 556 N.E.2d 873, 145 Ill.Dec. 255 (4th Dist. 1990), in which the appellate court affirmed a trial court’s decision to instruct a malpractice jury to consider, first, issues of malpractice liability, and then move to damages only if it found the attorney guilty of malpractice for failing to file a case. The malpractice plaintiff presented its entire case at once, covering both the malpractice issues as well as the case-within-a-case facts having to do with the underlying personal injury action. At the end of the trial, the court gave three sets of jury instructions — one set dealing with the malpractice case, one set dealing with the underlying action, and one set for both cases together. The appellate court found that the malpractice case was nothing more than an ordinary negligence case and that the jury instructions were proper.

#### **E. [6.54] Jury Instructions — Standard of Care**

In 2006 the Illinois Supreme Court replaced I.P.I. Civil Nos. 105.01 and 105.02 with a new instruction. Now, the standard of care instruction for a legal malpractice claim is set forth in I.P.I. — Civil No. 105.01. This instruction, when applied to a legal malpractice claim, reads as follows:

**“Professional negligence” by a lawyer is the failure to do something that a reasonably careful lawyer [practicing in the same or similar localities] would do, . . . under circumstances similar to those shown by the evidence.**

**The phrase “deviated from the standard of practice” means the same thing as “professional negligence.”**

**To determine what is the standard of practice required in this case, you must rely upon opinion testimony from qualified witnesses, evidence of professional standards, evidence of by-laws/rules, regulations/policies/procedures, evidence of community practice, and other sources. You must not attempt to determine this question from any personal knowledge you have. The law does not say how a reasonably careful lawyer would act under these circumstances. That is for you to decide.**

This new I.P.I. is more than a subtle change from the prior instructions. First, the new instruction refers to “rules” and “regulations” as evidence of the standard of practice. Second, the comment specifically allows evidence of “rules of professional conduct.” Finally, while the former instruction defined standard of care in terms of a “reasonably well-qualified” professional, the new instruction uses the language “reasonably careful.” The instruction does not however discuss how the rules and regulations and other standards are placed into evidence.

It is important to note that the first two sentences of the third paragraph must be included unless the “common knowledge” exception applies. Additionally, if there is no issue of an applicable local standard of care, the locality language in the first paragraph can be removed.

While the Rules of Professional Conduct do not establish a separate duty or cause of action, several courts have held that the rules can be relevant to establishing the standard of care in a legal malpractice case. *Owens v. McDermott, Will & Emery*, 316 Ill.App.3d 340, 736 N.E.2d 145, 157, 249 Ill.Dec. 303 (1st Dist. 2000), citing *Nagy v. Beckley*, 218 Ill.App.3d 875, 578 N.E.2d 1134, 161 Ill.Dec. 488 (1st Dist. 1991). From the plaintiff’s perspective, if the plaintiff is relying on the Illinois Rules of Professional Conduct to establish the standard of care, the plaintiff should request a jury instruction in the format of I.P.I. — Civil No. 60.01 (Violation of Statute, Ordinance, or Administrative Regulation). Such an instruction might state:

**There was in force in the State of Illinois at the time of the occurrence in question [certain rules] [a certain rule] which provided that:**

[quote the Rule(s) of Professional Conduct]

**If you decide that [a party] [the parties] violated the [statute] [ordinance] [regulation] [rule] [order] on the occasion in question, then you may consider that fact together with all the other facts to what extent, if any, [a party] [the parties] [was] [were] negligent before and at the time of the occurrence.**

*See Mayol v. Summers, Watson & Kimpel*, 223 Ill.App.3d 794, 585 N.E.2d 1176, 1186, 166 Ill.Dec. 154 (4th Dist. 1992) (“we hold that jury instructions may quote attorney disciplinary rules in legal malpractice cases to the same extent as they may quote statutes and ordinances in instructions in other types of negligence cases”).

From the defendant's point of view, it may be argued that *Mayol* is incorrect and has not been universally followed to the extent that disciplinary rules are admitted as a part of a jury instruction without expert validation. Even in the case of the new I.P.I. — Civil No. 105.01, it will be argued that the Rules of Professional Conduct typically require foundation in the form of qualified expert testimony. The Rules of Professional Conduct are not always self-evident as they are intended to be very broad statements of ethics and professional conduct. Although the plaintiff disciplinary may argue that rules may have the force and effect of law (*see In re Vrdolyak*, 137 Ill.2d 407, 560 N.E.2d 840, 148 Ill.Dec. 243 (1990)), the simple quotation of a disciplinary rule as being the equivalent of an ordinance may result in oversimplifying the applicable professional standard. Therefore, unless the plaintiff has proffered an expert whose opinion relies on a particular Rule of Professional Conduct and that witness testifies how that standard establishes the standard of care, the defense may contend that the use of I.P.I. — Civil No. 60.01 is unduly prejudicial and should be disallowed.

The issues framed in the underlying case or legal matter may not be covered by applicable pattern jury instructions. Also, pattern instructions may not accurately state the law applying to peculiar aspects of legal malpractice, such as “but for” proximate cause, judgmental defense, viability of claims after discharge, or the effect of an underlying settlement. In *Weisman v. Schiller, Ducanto & Fleck, Ltd.*, 368 Ill.App.3d 41, 856 N.E.2d 1124, 306 Ill.Dec. 29 (1st Dist. 2006), the client was not entitled to a non-pattern jury instruction on the issue of viability of her claims in a divorce action after she discharged the lawyer. By comparison, the same appellate court let stand the defendant's long form instruction on sole proximate cause, I.P.I. — Civil (1995) No. 12.04, which was given along with I.P.I. — Civil (1995) No. 15.01 on proximate cause.

Legal malpractice practitioners will be guided by the desire to tender instructions that state the law fairly and correctly. Given that the “but for” standard of proximate cause differs from the definition in I.P.I. — Civil (1995) No. 15.01, thought must be given to how these two insistent legal standards can be reconciled. *Weisman* approved the tender of a pattern sole proximate cause instruction by the defense because the underlying claims were still viable at discharge.

Defense counsel may wish to consider tendering a non-pattern “but for” proximate cause instruction, although no reviewing Illinois court has expressly approved one as of the date of this edition.

#### **F. [6.55] Remittitur — The Judge's Role in Screening Punitive Damages**

Punitive damages are not allowed as a matter of right in legal malpractice cases. 735 ILCS 5/2-1115. In certain cases, even after a jury has awarded punitive damages, the trial court still has discretion to grant remittitur or to give a portion of the award to the State of Illinois Department of Human Services. 735 ILCS 5/2-1207.

## V. [6.56] ARBITRATION AND MEDIATION OF LEGAL MALPRACTICE CASES

Arbitration is a favored method of settling disputes in Illinois. *Kostakos v. KSN Joint Venture No. 1*, 142 Ill.App.3d 533, 491 N.E.2d 1322, 96 Ill.Dec. 862 (1st Dist. 1986). Arbitration clauses in attorney-client agreements are generally enforceable. *See, e.g., Woods v. Patterson Law Firm, P.C.*, 381 Ill.App.3d 989, 866 N.E.2d 1080, 320 Ill.Dec. 11 (1st Dist. 2008). However, in *Woods* the law firm was deemed to have waived its arbitration right by actively participating in litigation motion practice and discovery. But see the dissenting opinion of Justice Wolfson in *Woods* which states: “No judicial proceeding by a party ... shall be deemed a waiver of the party’s rights to arbitration. Am. Arb. Ass’n Co. R 48(a) (2005).” 866 N.E.2d at 1088.

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### PRACTICE POINTER

- ✓ Clients and attorneys seeking arbitration must consider the effect on malpractice insurance coverage. Many lawyer professional liability policies are written to exclude mandatory or binding alternative dispute resolution, without the prior consent of the insurer. Hence, consent of the insurer is typically a requisite to exercising a right to compel binding arbitration.
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A trend that continues to grow in the area of civil litigation is alternative dispute resolution. Beyond agreeing to arbitrate their claims, parties are increasingly attempting to use non-binding mediation as a means to resolve their disputes. Legal malpractice claims are particularly suited for mediation.

The advantages of a mediation to the plaintiff client are primarily the ability to obtain monetary relief without having to incur the substantial costs associated with litigating a legal malpractice claim through trial, and possibly through appeal. As discussed throughout this chapter, litigating the claim of attorney negligence and the “case within the case” can often be an expensive and time consuming proposition. A mediation also will often allow the client to meet face-to-face with the former attorney and to express the source of his or her dissatisfaction. When done properly, clients often find this “psychic satisfaction” to be of value. At the same time, counsel for the parties want to prevent a mediation from turning into a “name-calling” session that will preclude any possibility of resolution.

Likewise, mediation can benefit the attorney defendant (and its insurer). Publicity from a negative judgment entered in a legal malpractice case is not a good result for any attorney. Moreover, as it would be for any client, litigation generally is a time-consuming experience that prevents the attorney from attending to his or her current clients’ needs and the needs of the law practice. In a controlled environment, the defendant attorney can usually express in a reasonable manner why the client’s belief that the lawyer engaged in malpractice is incorrect. From the attorney’s and an insurer’s perspective, mediation is also a way to contain legal fees and costs and to minimize the exposure (or at least the unpredictability) that comes from a trial by jury.

For a successful mediation to occur, three things must happen: (a) the parties must be willing to engage in good-faith mediation; (b) a good mediator must be retained; and (c) the parties must be prepared. As to the first point, if either the client or the attorney is determined to prevail and obtain a 100 percent victory, mediation is not a good use of the parties' time or resources. The parties must come to mediation with the desire to settle the dispute.

A good mediator is also key to a positive mediation. Attorneys for the client and the defendant lawyer should consider the personality of the parties and what type of mediator is best suited for the particular dispute. A good mediator generally has the ability to express himself or herself in different ways to different parties as the circumstances dictate. In other words, a good mediator can be compassionate, tough, and candid as required.

Mediators can be found through a variety of organizations that have come into being the last several years. There are also a number of mediators who work independently. Counsel should consider the advantages and disadvantages of using the services of a professional mediator versus the services of, for example, an attorney who mediates some of the time. The mediator should also have knowledge of the legal malpractice area as there are often specialized issues that arise in a legal malpractice action that impact the probability of success for either party.

Generally, mediators are not cheap. However, this is one area in which the parties will most likely "get what they pay for." Counsel should use their own contacts to identify potential mediators who have presided over successful mediations of legal malpractice claims.

There is, of course, no right time to mediate. The parties have to weigh different considerations in deciding whether they have enough information to allow a meaningful mediation. As an example, certain legal malpractice cases are document driven — between e-mails, correspondence, claim files, pleadings, etc. There is not a great need to take depositions because most of the "story" is in the documents. At the same time, depositions of the attorney, the client, and/or other key witnesses may be essential before parties feel comfortable participating in mediation. Like everything else, there are costs and benefits to litigating the dispute before pursuing mediation.

Finally, the parties must be prepared for the mediation. Normally, a mediator will require the parties to submit "position statements" before the mediation. Unless there is a reason not to do so, the parties should exchange their position statements. In order to evaluate potential exposure of a claim it is helpful if each side put its "best foot forward" for the mediation and not "hold back." The mediator should be provided with the relevant facts, documents, and the relevant law. At the same time, the parties should be careful not to overwhelm the mediator with too much, such that the mediator cannot understand the dispute. It is often helpful for the parties' counsel and the mediator to have a prehearing conference to identify the principle issues in the dispute and any complex issues of which the mediator should be aware.

The parties should also consider whether it is advisable to submit reports from experts on the issues of liability and/or damages to the extent such disclosures have not been made prior to the mediation. From the plaintiff's perspective, the presentation of a report on the issue of liability

and/or damages may provide credibility for the claim not only to the defendant attorney but also to any insurer who will have to make the decision whether to pay money as part of any settlement. Again, each party has to consider how much of its case it wants to show the other side.